

10-31-1974

San Francisco Peninsula Rail Commuter Service - October 31, 1974

Assembly Committee on Transportation

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Assembly California Legislature

LOUIS J. PAPAN

INTERIM SUBCOMMITTEE ON SAN FRANCISCO
PENINSULA RAIL COMMUTER SERVICE OF THE
ASSEMBLY COMMITTEE ON TRANSPORTATION

OCTOBER 31, 1974

MEMBERS

LOUIS J. PAPAN, Chairman
HOWARD BERMAN
JOHN FORAN
BILL LOCKYER
KEN MEADE
BOB WOOD

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ASSEMBLY TRANSPORTATION SUBCOMMITTEE HEARING

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GOLDEN GATE UNIVERSITY

Thursday, October 31, 1974

Morning Session - 10:30 o'clock a.m.

State Building
455 Golden Gate Avenue
San Francisco, California

Chairman: Louis J. Papan

Pages 1 - 64

HARRY A. CANNON, C. S. R.

Certified Reporters and Notaries

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SAN FRANCISCO, CALIFORNIA 94104
(415) 391-7421

1 On Thursday, October 31, 1974, commencing at the hour
2 of 10:30 o'clock a.m. thereof, the Transportation Sub-
3 committee of the State Assembly of California convened
4 before me, FRANK G. HUDGINS, a Notary Public in and for the
5 City and County of San Francisco, State of California.
6 The following is a transcript of said proceedings.

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CALIFORNIA STATE DEPOSITORY

JUL 1 6 1975

1 CHAIRMAN: Louis J. Papan

2
3 ASSEMBLYMEN: Dixon Arnetto

4 Howard Berman

5 Richard Hayden

6 William Lockyer

7 Robert Wood

8
9 LEGISLATIVE ASSISTANT: Donald C. Fields

10 DEPUTY LEGISLATIVE COUNSEL: James L. Ashford

1 CHAIRMAN PAPAN: Good morning, ladies and gentlemen.
2 I am sorry for the inconvenience, and I'm hoping to get
3 additional chairs for the people that are standing.

4 I would like, before reading my opening statement, to
5 apprise those who will be testifying of the fact that I
6 intend to put all witnesses under oath before testimony will
7 be received.

8 With that, I would like at this time to introduce the
9 members of the committee and the two people who are part of
10 the staffing of this committee.

11 I'd like to begin with Assemblyman Richard Hayden from
12 San Jose, a former Vice Chairman of Transportation; the
13 present Vice Chairman of the Transportation Committee,
14 Assemblyman Bill Lockyer; a member of my staff, Don Fields,
15 and Mr. Ashford from Legislative Counsel, sitting on my
16 right.

17 Before beginning, I'd like to make a few brief remarks.

18 We became involved in this issue last August when the
19 Southern Pacific Transportation Company announced it was
20 applying to the California Public Utilities Commission for
21 a fare increase of 111 percent. I voiced my concern at the
22 time that an unprecedented request such as this was
23 tantamount to asking to discontinue service, and that I
24 believed such a discontinuance was not in the public interest.

25 We are at a crossroads for transportation planning on
26 the Peninsula. Our situation is similar to the events which
27 preceded the abandonment of the rail street car system in
28 Los Angeles County during the 1950's. As a state legis-

1 lator, and a member of the Assembly Committee on Trans-
2 portation, I believe it is my responsibility and the
3 responsibility of the legislature to help develop public
4 transportation alternatives to the automobile. In order to
5 open additional alternatives, I am planning to introduce a
6 package of legislation next year which would directly affect
7 transportation alternatives on the San Francisco Peninsula.
8 Specifically, I will introduce legislation to make gas tax
9 money available as a potential subsidy for the Southern
10 Pacific Transportation Company in the event the voters of
11 San Mateo and Santa Clara Counties choose to upgrade the
12 present Southern Pacific commuter service.

13 The mandate of this subcommittee is to investigate the
14 impact of a rate increase of the magnitude of 111 percent on
15 transportation planning on the San Francisco Peninsula.
16 My concern is that we keep our options open. In the event
17 the Southern Pacific Transportation Company has information
18 which indicates that a rate increase of 111 percent would
19 severely damage the ridership of the commuter service, then
20 I believe it is in the public interest to make that
21 information available to the committee. If such information
22 exists, it might be necessary for the legislature to react
23 on an emergency basis to make available whatever State funds
24 could be obtained for the purposes of offering viable
25 alternatives to straight fare increases.

26 The energy crisis, the worsening condition of our air,
27 and the rising price of gasoline require that public
28 transportation no longer be considered the exclusive domain

1 of private, profit-making corporations.

2 The voters of San Mateo County are on the eve of
3 deciding the fate of a possible transit district in San
4 Mateo County. I believe the information generated by our
5 subcommittee during the hearings in Burlingame and the
6 testimony which will be heard here today will be of major
7 importance to the voters of San Mateo County who are
8 presently deciding the fate of Proposition 'A' -- the transit
9 district. I believe the fare increase application represents
10 only the tip of the iceberg in terms of the greater public
11 concern. If you compare the cost of improving and upgrading
12 Southern Pacific commute service from San Francisco to San
13 Jose to BART status, with the cost of extending BART through
14 San Mateo County, not even into Santa Clara County, the
15 recent Metropolitan Transportation Commission study indicates
16 that it would be \$300 million more costly to extend BART
17 just through San Mateo County, not even into Santa Clara
18 County.

19 If a fare increase of 111 percent is, as I believe it
20 is, tantamount to discontinuance of service, then clearly
21 this is a situation in which the Southern Pacific Transport-
22 ation Company is attempting to remove a viable transportation
23 alternative from the public policy process prior to any
24 determination by the voters as to what is in their best
25 interest.

26 I would like the record to reflect my analysis of the
27 "cooperation" this subcommittee has received from Southern
28 Pacific to date:

1 Southern Pacific first refused to testi-
2 fy at our Burlingame hearings, then under the
3 threat of subpoena they consented to testify.

4 After the existence of the Banks study
5 became public, Southern Pacific officials
6 indicated they would not provide a copy of
7 the study to the subcommittee.

8 Southern Pacific officials initially
9 indicated they would not cooperating in
10 bringing Mr. R. L. Banks before the sub-
11 committee at our expense.

12 William Jaekle, Vice-President, Southern
13 Pacific Transportation Company, left the State
14 for what SP officials referred to as a long-
15 planned "vacation." During our meetings and
16 conversations with SP officials, no mention
17 was ever made of any of Mr. Jaekle's vacation
18 plans.

19 Upon learning of Mr. Jaekle's "vacation," I issued a
20 subpoena for Mr. Benjamin F. Biaggini, President, Southern
21 Pacific Transportation Company. I am pleased to report that
22 Southern Pacific officials have been considerably more
23 cooperative since the subpoenaing of Mr. Biaggini. An
24 arrangement was reached whereby they would agree to honor
25 our subpoenas for Mr. Jaekle and the Banks study, and in
26 return I excused Mr. Biaggini from this hearing in order
27 that he might attend a previously-scheduled engagement. In
28 addition, Mr. R. L. Banks, the consultant who put together

1 the study, has agreed to appear before the subcommittee at
2 some later date in the event any questions should arise
3 regarding the material in his study.

4 That brings us up to date. We are now prepared to hear
5 the first witness.

6 The first witness will be Mr. Bennett.

7 Mr. Bennett, I stated earlier that I will put everyone
8 under oath. Would you raise your right hand?

9 WILLIAM BENNETT,
10 having been first duly sworn, testified as follows:

11 MR. BENNETT: My name is William Bennett. Presently I
12 am a member of the State Board of Equalization.

13 Before that I was a Deputy Attorney General representing
14 the State of California in regulatory matters, including
15 matters before this commission.

16 I was thereafter appointed chief counsel of the
17 California Public Utilities Commission. I was made a
18 commissioner.

19 I served as president of this commission. My term
20 expired in 1968.

21 What I have, Mr. Chairman, is general and, I hope, in-
22 formative and, I think, necessary for you to understand why
23 you are here in this room at this time with the recalcitrant
24 Southern Pacific.

25 By way of background, we are in a crisis in regulation
26 and consumer protection in this state because the utilities
27 of this state, including the Southern Pacific, control this
28 commission.

1 The first members of this commission were selected at
2 the Bohemian Club by lobbyists representing the utilities of
3 this state, including the Southern Pacific.

4 A list of those names was given to Governor Reagan's
5 office.

6 And from that list he selected his first commissioners,
7 one of whom was recommended by the Southern Pacific.

8 This is set forth in a transcript wherein I, as a
9 commissioner, examined Mr. Biaggini under oath.

10 And to confirm the truth of what I say, when Governor
11 Reagan was confronted with this at a press conference he
12 said he knew of the practice and saw nothing wrong with it.

13 And this is the reason that you have the obstinancy to
14 the commission, to the public and to your committee.

15 You should also know that the staff of this commission
16 has been immobilized, manipulated, frustrated, disciplined.
17 for speaking the truth, even speaking the truth under oath,
18 and there is chapter and verse on that, and I won't go into
19 it now.

20 You should also know that the members of this commission
21 are wined and dined and lobbied extensively by the utilities
22 they regulate.

23 And you may say, "Well, that's a practice in the
24 legislature with various members." But you are in a
25 different category, as am I. We do not have the powers of
26 judges; we do not sit on cases making records; we do not
27 make findings of fact and conclusions of law.

28 And, more than that, the law of this land, of the

1 federal and state courts, states quite clearly that exparty
2 contacts are prohibited, and any decisions which are affected
3 by same are void.

4 Now, we are at the end of an administration of this
5 state. I know this commission. I know how it has been
6 perverted. I know how utilities and railroads, including the
7 Southern Pacific, come in here and get what they wish merely
8 for the asking.

9 And you will be told you have no authority to inquire
10 into this, and the reason I am making these charges -- and
11 I stand by them -- is that I urge you to make this the
12 beginning of a complete and thorough investigation of the
13 Public Utilities Commission of the State of California and
14 the members thereof and what they have done to this staff.

15 They have destroyed one of the finest regulatory
16 commissions in the United States.

17 New York and California were supreme to all other
18 commissions, including all federal regulatory commissions.
19 Indeed, we furnished personnel to those commissions. And
20 this is all gone.

21 For example, Thomas Steele became one of the finest
22 rate-of-return experts in the United States of America.
23 I worked with him. He testified on rate increases. I
24 schooled him in the matter of testifying as a witness.

25 He was made literally or figuratively, so to speak,
26 a file clerk, was not permitted to testify, not permitted
27 to give his judgment about excessive earnings. And in
28 frustration and disgust he quit and went to the Federal

1 power Commission.

2 I could go on and on.

3 A young attorney named Leonard Snader, who vigorously
4 opposed the telephone company, quit in disgust because of
5 lack of promotion or something of the kind.

6 Now, what you are seeing today is a rush to rate
7 increases all over the State by the utilities because they
8 know the sands are running out in the hourglass.

9 Now, this administration has two short months to go.
10 We now have an obligation as Democrats to find out what
11 has been going on, to find out how a commissioner can sit
12 at a table and partake of food and drink and hospitality
13 of a lobbyist for a utility or sit at a football game or be
14 a guest of the telephone company or take favors from the
15 Southern Pacific, and then at the same time to sit up there
16 and be impartial. There is no way that result can obtain.

17 So I urge you not to stop here. You must rewrite the
18 history and tradition of this state.

19 The thing that gave us this commission in the first
20 instance, the thing that elected Hiram Johnson as governor
21 of the populace as a progressive was the corruption of
22 State government by the Southern Pacific. It is all con-
23 tained in "The Octopus" by Frank Norris. It hasn't changed.

24 Rather than define the public will through elected
25 representatives with a frown, now they do it with a smile.
26 But the result is the same.

27 And you should not be deterred from an aggressive in-
28 quiry to what is going on with the notion that you have no

1 jurisdiction.

2 You have full legislative authority to investigate any-
3 thing this commission does. Why? Because you are the law
4 makers, and you can embark on a fact-finding hearing to deter-
5 mine what laws should be passed to protect the public.

6 And so having said that, I will conclude now. If you
7 have any questions, I will be happy to answer them.

8 CHAIRMAN PAPAN: Do any of the members have any ques-
9 tions? Mr. Lockyer?

10 ASSEMBLYMAN LOCKYER: Mr. Bennett, one of the things
11 that we have seen with sort of consistent regularity is that
12 a staff report will be issued on a particular investigation,
13 and then those staff reports seem to be more often than not
14 ignored by the commissioners when they make a final decision.

15 Does this tie into your thinking of the way in which
16 staff is mistreating --

17 MR. BENNETT: Staff members will tell, for example,
18 in opposing a major rate increase, "Don't bother to write
19 a brief. We have already made a decision."

20 The telephone case is an example. I have an appeal to
21 the California Supreme Court on that. On that, now, the
22 commission ignored all basic law, two Supreme Court decisions
23 on this case, its own staff, and again, despite having been
24 compelled to refund \$233-million dollars, gave the telephone
25 company, on the same discredit basis and theory of law,
26 another two or \$250-million dollars. That, I suspect, is
27 going to be reversed again.

28 In the PG&E case, the telephone case, the Southern Calif-

1 ornia Edison case, all over the state, they are giving it
2 away as fast as the utilities can line up, and they are
3 ignoring staff directives, staff testimony, staff advice
4 in this conference room.

5 We have gotten to the point in this state where we
6 are getting rate increases without due process. And you
7 should look into this.

8 A lot of people can't afford to live in California any-
9 more. Utilities now get massive rate increases in the order
10 of \$200 and \$300 million dollars without hearings, based upon
11 this dubious and probably unconstitutional fuel adjustment
12 clause where they get increases without hearings.

13 Now, that is contrary to our constitution, our act,
14 our precedents.

15 And these men, whose only qualification to sit there
16 is that they knew the govenor, in their ignorance go along
17 because they only see one side of the story, so to speak.
18 And that is a problem.

19 ASSEMBLYMAN LOCKYER: Let me ask you, drawing on your
20 considerable expertise, having, of course, been a former
21 member, obviously the kind of people that the governor appoints,
22 is, I suppose, the most critical decision that is made with
23 respect to the kind of work that gets done here.

24 But have you thought about any structural or legal
25 changes that ought to be put before the legislature or the
26 people --

27 MR. BENNETT: Yes.

28 ASSEMBLYMAN LOCKYER: -- with respect to the whole pro-

1 cess?

2 MR. BENNETT: Yes.

3 ASSEMBLYMAN LOCKYER: What kind of --

4 MR. BENNETT: We should go to the federal system whereby
5 we create the independent hearing officer who is inviolate,
6 who is judgeline, who may not be influenced or affected by
7 the orders of his superiors, the commissioners or by the
8 parties before him.

9 He decides matters only on those things presented to
10 him in an open hearing tested by cross-examination.

11 He writes a decision independent of all outside in-
12 fluences, including commissioners, and he files that in the
13 public record, and then the commissioners, as is their power
14 so to do, and their right, may modify it. But at least we
15 know what the man who heard the evidence thinks.

16 I can give you an example when I took the PG&E to the
17 California Supreme Court, where the hearing officer gave
18 a memorandum to the commissioners telling them that the
19 returns they were adopting were, in his view, excessive and
20 could not be supported by the record.

21 I could talk here for two days about cases like this.
22 The place is poisoned with this kind of improper conduct,
23 and you should give a message to the staff of this commission,
24 offering them your protection, if you can do it, if they
25 will come forward and tell you what has been going on around
26 here.

27 CHAIRMAN PAPAN: Mr. Berman has joined us, Assemblyman
28 Berman from Southern California.

1 ASSEMBLYMAN BERMAN: This whole question about calling
2 members of the commission before a committee of the legis-
3 lature, other than, I assume, when the PUC approves a rate
4 increase, the issue findings which, supposedly, justify that.

5 MR. BENNETT: By law they are required.

6 ASSEMBLYMAN BERMAN: Other than going to court to either
7 challenge the propriety of that conclusion based upon the
8 findings or the accuracy of the findings, do you think that
9 we could legally, notwithstanding any privilege that was
10 asserted, question those commissioners about the types of
11 contacts and inputs they had in coming to their conclusion
12 which might go beyond the record?

13 MR. BENNETT: Yes, I do, and I can conceive of this
14 before I get to the narrow legal basis. What would it look
15 like to the public of this state if a man, a public official,
16 asked by a member of the legislature, the people's representa-
17 tive, if he was conducting himself properly if he refused
18 to testify? That would be an answer in and of itself, wouldn't
19 it?

20 ASSEMBLYMAN BERMAN: You think that would be the political --

21 MR. BENNETT: Of course, it would, and more than that,
22 in my view, you may make such inquiry.

23 Now, you cannot go into the ratio decidendi, what we
24 call the decision making process, where you could not inquire
25 of Chief Justice Earl Warren what he thought when he heard
26 Brown versus (external noise obliterates words). But as
27 to what lobbyists talked to them about when they were wined
28 and dined in Hawaii, who paid expense accounts and hotel bills,

1 whose credit cards were used, who gave them tickets to foot-
2 ball games, these things were done in front of other people;
3 there is nothing privileged or confidential about them,
4 and they have no relevancy directly to anything that occurs
5 in here. And those things should be inquired about.

6 CHAIRMAN PAPAN: Are there any other questions by any
7 of the members?

8 Thank you, Mr. Bennett.

9 Assemblyman Bob Wood has joined us. Nice to have you
10 with us, Bob.

11 I think at this time we would like to hear from Mr.
12 Charles W. Burkett of the Southern Pacific Transportation
13 Company.

14 Mr. Burkett, would you raise your right hand, please.

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1 CHARLES W. BURKETT

2 being duly sworn, testified as follows:

3 CHAIRMAN PAPAN: Thank you, Mr. Burkett.

4 My understanding, Mr. Burkett, is that you have a pre-
5 pared statement that you chose to enter into the record.

6 And if the member would hold their questions until
7 Mr. Burkett has had an opportunity to read his statement,
8 then we'll ask -- I don't think we are transmitting, Sergeant.,
9 are we? Is that better?

10 SPECTATOR: Can't hear you at all.

11 CHAIRMAN PAPAN: There is no P.A.?

12 Would the witness and the members of the committee,
13 as well as myself, we will make a concerted effort to be
14 heard.

15 Mr. Burkett has a prepared statement. He intends to
16 read that prepared statement, and I respectfully request
17 that the members of the committee hold their questions until
18 Mr. Burkett has presented his statement.

19 With that, Mr. Burkett, would you commence.

20 MR. BURKETT: Yes, sir, and I thank you for your courtesy,
21 because I think that we will save a lot of time and have this
22 whole matter go to the most efficient conclusion by following
23 this particular procedure.

24 My name is Charles W. Burkett, One Market
25 Street, San Francisco, California 94105. I am
26 General Solicitor of Southern Pacific Transpor-
27 tation Company.

28 In the latter part of May 1974, I retained

1 Mr. R. L. Banks of Washington, D. C. to commence
2 a study of the effect that increases in our penin-
3 sula passenger fares might have on gross revenues.
4 This study has not been completed, although, while
5 I was in Washington on another matter on July 9,
6 1974, I was handed by Mr. Banks worksheets repre-
7 senting the material he had developed as of that
8 date. I brought these worksheets back to San
9 Francisco, and some three days later I directed
10 Mr. Banks to hold the study in abeyance until he
11 heard further from me. I gave this direction
12 when I reached the tentative conclusion from the
13 worksheets and from other preliminary information
14 that we would determine the effect of fare increases
15 on net revenues rather than gross revenues. To
16 make that determination, we necessarily would have
17 to know the expense savings resulting from any
18 losses in patronage. We did not have that data
19 available, and I realized it would need to be
20 developed by a separate study, which it would
21 be impractical for Mr. Banks to undertake.

22 The application for the increase in penin-
23 sula fares filed with the California Public Util-
24 ities Commission on August 23, 1974, and assigned
25 Docket No. 55131 bears my signature. I assume
26 personal responsibility for the 111 percent in-
27 crease therein requested. The 111 percent is
28 the figure by which fares would have to be in-

1 creased to meet our estimated 1974 costs. This
2 assumes either (1) no loss in patronage, or (2)
3 an expense savings equal to any revenue reduction
4 resulting from patronage loss.

5 A controlling reason for seeking this 111 per-
6 cent rather than some lesser amount stems from the
7 difference in California law from that of most other
8 states. These other states permit railroads and
9 other public utilities to increase rates merely
10 by filing tariffs with regulatory commissions to
11 be effective on 30 days' notice subject to possible
12 suspension for a limited time period. The Calif-
13 ornia Constitution and Public Utilities Code pre-
14 vent railroads and other public utilities from
15 raising rates except after a showing before the
16 California Public Utilities Commission and a find-
17 ing in a decision by that commission that proposed
18 increase is justified. In order to make that
19 showing and secure that decision, the Rules of
20 Practice of the Commission require a utility to
21 file an application setting forth the increase it
22 is proposing. Upon filing of this application, the
23 Commission will usually assign it for formal hearing
24 at which the utility has the burden of proff of
25 coming forward with evidence to justify the increase.

26 The witnesses for an applicant utility after
27 presenting evidence in support of a proposed in-
28 crease are cross-examined as in a court of law.

1 This cross-examination is usually conducted not
2 only by parties who have appeared as protestants
3 but also by the Commission staff. After the com-
4 pletion of cross-examination, the Commission Staff,
5 as well as the other parties, may make an independent
6 presentation to show only some portion or none of
7 the proposed increase is justified. These presenta-
8 tions by applicant and the other parties may in-
9 clude showings as to the effect of the proposed
10 increase on the net revenues of the utility. If
11 the traffic covered by the proposed increase is
12 subject to alleged loss, the parties will show
13 resulting net revenues, based on the gross reve-
14 nues which might be lost and the operating expenses
15 which might be saved. A showing of the point of
16 maximizing net revenues, if lower than the increase
17 sought, would constitute the maximum increase the
18 Commission would authorize.

19 After the hearing has concluded, the Commission
20 takes the application under submission and subse-
21 quently issues a decision in which it may find (1)
22 that the proposed increase has been justified in its
23 entirety, (2) that the proposed increase has not
24 been justified but some portion of that increase
25 has been justified, or (3) that no increase at all
26 has been justified. However, it is not lawful for
27 the Commission to find justified any greater in-
28 crease than the utility has sought in its applica-

1 tion. Moreover, there are constitutional diffi-
2 culties of procedural due process should the
3 utility attempt to amend its application to
4 secure a greater increase than it originally
5 sought, particularly after the hearing process
6 has commenced.

7 A decision of the California Public Utilities
8 Commission authorizing any increase is subject to
9 review by the California Supreme Court and the
10 United States Supreme Court.

11 I decided that the 111 percent was the maximum
12 increase which could be justified and I, therefore,
13 used that figure in the application. I unequivoc-
14 ally state it is my opinion as an attorney that
15 the 111 percent increase referred to in the
16 application filed August 23, 1974, is proper in
17 the circumstances I have outlined. That was my
18 opinion when the application was filed, and it is
19 my opinion today.

20 While I have brought into this hearing room in
21 response to the subcommittee's subpoena those work-
22 sheets handed to me July 9, 1974, I respectfully
23 express the view that requiring me to produce them
24 would deny me protection which the California
25 Legislature intended to provide. The Legislature
26 has enacted Section 2016 of the Code of Civil Pro-
27 cedure which protects the work product of an
28 attorney from discovery and states:

1 "It is the policy of this State (i)
2 to preserve the rights of attorneys
3 to prepare cases for trial with that
4 degree of privacy necessary to encour-
5 age them to prepare their cases thor-
6 oughly and to investigate not only the
7 favorable but the unfavorable aspects
8 of such cases and (ii) to prevent an
9 attorney from taking undue advantage
10 of his adversary's industry or efforts."

11 Section 1794 of the Public Utilities Code, as enacted
12 by the Legislature, provides that the Public Utilities
13 Commission is governed by the same rules. The work-
14 sheets prepared by Mr. Banks and handed me July 9,
15 1974, fall within the definition of work product
16 under Section 2016 of the Code of Civil Procedure, as
17 defined by the courts. Yet in this hearing this sub-
18 committee is using its subpoena power to circumvent
19 these safeguards as they have been developed. More-
20 over, I respectfully point out that the chairman of
21 this subcommittee has made a formal appearance as
22 a party in the peninsula fare increase proceeding
23 which is presently pending before the California
24 Public Utilities Commission as Docket No. 55131.

25 It is appropriate that I comment on certain public
26 statements which have been made concerning testimony
27 given by Mr. W. M. Jaekle, Vice-President - Engineering
28 and Research of Southern Pacific Transportation Company,
at the hearing held September 19, 1974, before
this subcommittee. Mr. Jaekle attended that hearing
on my recommendation in the light of certain proposed
questions set forth in a letter to me from Mr. Donald

1 C. Fields, Legislative Assistant to Mr. Papan. The
2 preponderance of those questions related to matters
3 in which I knew Mr. Jaekle had an appropriate back-
4 ground. To the best of my knowledge, Mr. Jaekle at
5 that time neither knew of the worksheets of Mr. Banks
6 nor of his work done in their preparation. I gave
7 no information to Mr. Jaekle on the subject.
8 Thank you very much.

9
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12 CHAIRMAN PAPAN: Mr. Burkett, does Mr. Jaekle work

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1 directly for you, and what is your relationship with Mr.
2 Jaekle in the organizational structure of Southern Pacific?

3 MR. BURKETT: I am an attorney for Southern Pacific.
4 Mr. Jaekle is a vice-president in the Operating Department
5 of Southern Pacific. Mr. Jaekle does not report to me and
6 I do not report to him.

7 CHAIRMAN PAPAN: He appeared at those hearings because
8 you recommended that he appear on behalf of Southern Pacific
9 Transportation Company?

10 MR. BURKETT: Yes, sir.

11 CHAIRMAN PAPAN: Do you have in your possession a letter
12 sent by me dated September 18, 1974, addressed to you at
13 your address of One Market Street, San Francisco?

14 MR. BURKETT: No, I do not have that -- I have a letter
15 of September 18.

16 CHAIRMAN PAPAN: Right.

17 THE WITNESS: I have that letter in my possession.

18 MR. TAGGART: I believe, Mr. Papan, that letter was
19 signed by Donald C. Fields, Legislative Assistant.

20 Is that the same letter you're referring to?

21 MR. FIELDS: Yes.

22 CHAIRMAN PAPAN: Yes.

23 THE WITNESS: And that is a letter I specifically
24 referred to in my prepared statement.

25 CHAIRMAN PAPAN: Now, in the letter, if I might refer
26 to that with you --

27 MR. BURKETT: Yes, sir.

28 CHAIRMAN PAPAN: -- Item 1, the question was posed to

1 you, "Do you believe the proposed rate increase will
2 eliminate the present deficit your company is incurring as
3 a result of the Peninsula commuter service? If so, what
4 impact do you foresee this rate increase will have on the
5 number of automobiles utilizing the West Bay Peninsula
6 corridor?"

7 MR. BURKETT: Yes, sir.

8 CHAIRMAN PAPAN: Did you apprise Mr. Jaekle of our
9 concerns?

10 MR. BURKETT: I gave Mr. Jaekle a copy of the letter of
11 September 18, 1974.

12 CHAIRMAN PAPAN: And you felt that he should not have
13 been apprised of the fact that Southern Pacific had
14 commissioned a study in answer to that second concern?

15 MR. BURKETT: Mr. Papan, that was not the said study
16 which I commissioned Mr. Banks to do. And the study was
17 never completed. It was part of my work papers. And I will
18 answer your question very specifically. No, I did not tell
19 Mr. Jaekle. I did not consider it was proper, that there
20 was any reason to tell Mr. Jaekle. And I considered that
21 decision was the correct one.

22 CHAIRMAN PAPAN: Then, am I to infer from what you have
23 just stated that the commissioning of R. L. Banks was
24 exclusively your interest as an attorney for Southern Pacific
25 and you did not feel that, even though the committee
26 expressed a concern in that area, Mr. Jaekle would have been
27 -- should have been apprised or would have been apprised of
28 this study in the commission that you made of R. L. Banks?

1 MR. BURKETT: All right. I have two answers to your
2 question.

3 CHAIRMAN PAPAN: Okay.

4 MR. BURKETT: I will answer the first part of your
5 question affirmatively by saying that it was exclusively
6 commissioned by me as an attorney. Secondly, the study did
7 not show or develop what you have now suggested in your
8 question.

9 All that it showed, as I stated in my direct statement,
10 all that the study was directed to develop was the effect of
11 fare increases on gross revenues of Southern Pacific, and
12 nothing else.

13 CHAIRMAN PAPAN: Not on patrons?

14 MR. BURKETT: I will concede that in developing the
15 gross revenue figures there, necessarily, had to be some
16 development of subordinate facts respecting patronage, but
17 as far as I was concerned the study was made for one purpose
18 and one purpose alone, and that was to show the effect of
19 fare increases on gross revenues.

20 CHAIRMAN PAPAN: One other question and, then, Assembly-
21 man Lockyer has one and Assemblyman Berman will follow.

22 You have brought that study or those papers with you?

23 MR. BURKETT: Yes. As I stated in my prepared statement,
24 I have them in this hearing room.

25 CHAIRMAN PAPAN: And with the answer to that I will
26 ask Assemblyman Lockyer now to ask his questions of concern.

27 ASSEMBLYMAN LOCKYER: In your statement you went into
28 some considerable detail with respect to the process of

1 rate determination and the kind of data that the commission
2 reviews and things of that sort and seemed to, again, comment
3 on the importance in those proceedings of data with respect
4 to net profits that the particular service or company may be
5 receiving.

6 That is, the kind of key factual item that goes into
7 determinations of opinions of rate increases, is that
8 correct?

9 MR. BURKETT: No. I don't think it's a key factor.
10 I think it is a subordinate factor. I think the key factor
11 is a determination as to what the costs we are incurring
12 are. I consider that the key factor. I consider the
13 maximization of net revenues as a subordinate fact.

14 ASSEMBLYMAN LOCKYER: Obviously they're all connected.
15 That is the best way. If you know what the costs are you
16 know what gross and nets are and so on?

17 MR. BURKETT: Well, I don't think so. I don't consider
18 they are connected. We have had -- and I think at the
19 earlier hearings of this subcommittee that there was
20 extensive examination of Mr. John V. Lundeen, who was under
21 subpoena at this hearing, and as far as that is concerned,
22 I have attended and participated in enough of these hearings
23 so that I can say that the greater part of the time is
24 consumed in an attempt by the hearing examiner and by the
25 various parties to determine what the costs are, whether the
26 railroad's costs are correct and accurate and whether they
27 are properly presented and properly sustained.

28 I have been in hearings where that process has taken

1 many days and, yet, this point of net maximization of net
2 revenues might take a relatively small amount of time.

3 ASSEMBLYMAN LOCKYER: All right.

4 Well, when you cancelled the study --

5 MR. BURKETT: Yes.

6 ASSEMBLYMAN LOCKYER: -- that was under way, or held
7 it in abeyance, did you want to hold it in abeyance also
8 because not only would the data, perhaps, not be useful, as
9 you have indicated, but that it would just save the company
10 money to not have to complete the work?

11 MR. BURKETT: Oh, no. I think the reason I held it in
12 abeyance was that when I saw the results of the study, when
13 I had certain other information at my disposal in July, it
14 occurred to me that we would, necessarily, in this
15 particular proceeding, have to go the net-revenue route, and
16 I knew that to do so we would have to coordinate the gross
17 revenue study with the expense study.

18 Let me give you an example. It might be shown that
19 we were going to lose "X" percent of gross revenues. That
20 might be involved as a result of a loss of patronage on
21 persons traveling between San Francisco and San Bruno on
22 the one hand, or traveling between San Francisco and San Jose
23 on the other hand. It might be involved as a result of
24 losing patronage between San Mateo and San Jose on the other
25 hand. If we were going to make a determination of what our
26 cost savings would be -- and by "cost savings," I mean
27 real savings -- we would have to be able to pinpoint the
28 areas where we might lose the patronage and not just have a

1 blanket percentage for all points on the San Francisco
2 Peninsula.

3 ASSEMBLYMAN LOCKYER: Okay. I appreciate that.
4 But, again, now, when you commissioned the study and, then,
5 decided to hold it in abeyance, you just said that you
6 didn't do it for cost reasons but, rather, the information
7 wasn't that necessary or needed. Did that mean that you
8 saved money, then? Did the company save money?

9 MR. BURKETT: Oh, I think that was a negligible factor.
10 Maybe there is one thing I should explain which might help
11 you to understand. And that is, when I directed the study
12 in May, I did not know, obviously, the point of maximization
13 of gross revenues which might be developed by Mr. Banks.
14 Also at that time I did not know what percentage increase
15 we would have to have in our Peninsula fares to meet our
16 costs.

17 I, at that time, anticipated that there was a good
18 chance, at least 50-50 chance, that the point of maximizing
19 gross revenues would be higher than the increase that we
20 would have to seek to meet our costs. It follows, a fortiori,
21 that if I could show or if I could develop that the point of
22 maximizing gross revenues was above the particular percentage
23 we were seeking that I would not have to take the second
24 step and make the second half of the study.

25 And in July after reviewing the work sheets, after
26 getting certain additional information as to the area of
27 our costs and the probable percentage we would have to seek,
28 it occurred to me immediately that the percentage we would

1 have to seek would be higher than the maximization of gross
2 revenues. And, then, I had no choice except to decide, as
3 an attorney, and the decision was entirely mine, that we
4 should go the net-revenue route.

5 Now, let me just give you an example of that. That is,
6 if we lost "X" percentage of gross revenues, then, I think
7 we might well be able to establish on studies which have not
8 yet been completed that the savings of costs are the same "X"
9 percentage, or pretty close to that "X" percentage.

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1 ASSEMBLYMAN LOCKYER: What did that particular study
2 that you undertook cost, do you recall, roughly?

3 MR. BURKETT: Pardon me?

4 ASSEMBLYMAN LOCKYER: What did the study cost, the
5 Banks --

6 MR. BURKETT: Oh, I don't have that immediately
7 available.

8 ASSEMBLYMAN LOCKYER: You have no recollection?

9 MR. BURKETT: Well, I just feel that it's not
10 appropriate for me to go into that at this time.

11 CHAIRMAN PAPAN: Would you repeat that, sir?

12 MR. BURKETT: Yes. The question of the cost of the
13 study, I just don't feel that at this time I have enough
14 information to properly answer the question. If the
15 committee wishes to pursue it I will be glad to furnish or
16 to consider furnishing, subject to the advice of my attorney
17 here --

18 ASSEMBLYMAN LOCKYER: I thought you were the attorney.

19 MR. BURKETT: I am a witness under oath --

20 ASSEMBLYMAN LOCKYER: I understand.

21 MR. BURKETT: -- and Mr. Taggart is my attorney today.

22 ASSEMBLYMAN LOCKYER: I understand.

23 CHAIRMAN PAPAN: Can we resolve that now, Mr. Taggart?

24 What is your advice to your client in this instance where
25 we would like to know what that commission study cost Southern
26 Pacific Company so that we can --

27 MR. TAGGART: Unless I misunderstood the witness, he
28 has stated that he does not have that knowledge --

1 MR. BURKETT: I don't have it --

2 MR. TAGGART: -- in his mind. And I am relatively sure
3 that there is no bill from R. L. Banks which is included in
4 the material which was subpoenaed by the committee, so I
5 think he has given the only answer to the question he can,
6 Mr. Papan, that being that he doesn't know what the study
7 did cost or would cost.

8 And I will, most certainly, consider a request, formal
9 request, by the committee to look into that matter and
10 determine what the true cost is.

11 CHAIRMAN PAPAN: Well, would you consider this a formal
12 request?

13 MR. TAGGART: Yes, sir, I certainly will.

14 CHAIRMAN PAPAN: And you will agree to get us the
15 figure?

16 MR. TAGGART: I am agreeing to consider the formal
17 request.

18 CHAIRMAN PAPAN: All right.

19 ASSEMBLYMAN LOCKYER: It just strikes me as very
20 peculiar, Mr. Burkett, that you --

21 MR. TAGGART: Excuse me, Mr. Lockyer.

22 I don't want anything to be misunderstood. I can say
23 that I have no idea whether this study cost 10 cents or \$10.
24 I personally have no idea in the world. So let there be no
25 misunderstanding on that score.

26 MR. BURKETT: I think it would be helpful -- and, here
27 again, I did not anticipate the question. I cannot answer
28 the question with complete accuracy. I would like to look

1 into the matter, and I would like to discuss with Mr. Taggart
2 whether it is appropriate for us to provide the figure.

3 I will assure the subcommittee that we will give very
4 prompt consideration to the request.

5 ASSEMBLYMAN LOCKYER: It just strikes me as very
6 peculiar, sir, that you personally commissioned the study --

7 MR. BURKETT: Yes.

8 ASSEMBLYMAN LOCKYER: You personally made the decision
9 for 111 percent, but you don't recall, even roughly, what
10 that kind of work cost?

11 MR. TAGGART: That's not a question.

12 ASSEMBLYMAN LOCKYER: It seems odd. Now, that's not
13 a question. That is a comment.

14 MR. BURKETT: All right. Fine. I heard the comment.

15 ASSEMBLYMAN LOCKYER: Okay.

16 CHAIRMAN PAPAN: Before we go on, we will conduct
17 additional hearings, and I'd like to give you the assurance,
18 Mr. Burkett, that we will probably subpoena you again, and,
19 hopefully, in the next round you'll have the figure and,
20 then, you might follow advice of counsel, then, whether to
21 give us the figure or not.

22 MR. BURKETT: Well, that won't be necessary. I will
23 assure you that we will give you a reply with respect to
24 your question. I foresee no problem.

25 CHAIRMAN PAPAN: Thank you, sir.

26 ASSEMBLYMAN LOCKYER: Another final thing. Now, you
27 were making a lot of decisions with respect to the revenue
28 picture and potential costs and so on for the company as an

1 attorney. You kept telling us you were the attorney doing
2 that.

3 MR. BURKETT: Yes.

4 ASSEMBLYMAN LOCKYER: Don't you consult with other
5 people? Aaen't these more than legal decisions that are
6 made when it comes to the profits and costs of the company
7 and things of that sort?

8 Don't you talk to anyone else in the company in making
9 those judgments?

10 MR. BURKETT: Well, I think I will try to divide your
11 question into two parts.

12 Certainly, as far as determining what evidence and
13 investigations I should make as a lawyer, I do not consult
14 with any other parties except other lawyers of Southern
15 Pacific.

16 As far as overall policy is concerned, obviously I
17 confer with my client concerning these matters, but I also
18 will call your attention to the fact that under the by-laws
19 of Southern Pacific Transportation Company it is the law
20 department that is given general supervision and control of
21 all of the company's legal business.

22 I consider these decisions, generally, within the term
23 "legal business."

24 ASSEMBLYMAN LOCKYER: Okay. I will stop. I know
25 Mr. Berman --

26 CHAIRMAN PAPAN: Yes.

27 Before Mr. Berman, might I ask, following the line of
28 questioning of Assemblyman Lockyer, on the reimbursement of

1 Mr. R. L. Banks, was this process through the Bureau of
2 Transportation Research in your --

3 MR. BURKETT: No, sir, it was not processed through the
4 Bureau of Transportation Research.

5 CHAIRMAN PAPAN: You have answered the question, sir.

6 MR. BURKETT: It was processed through me.

7 CHAIRMAN PAPAN: Are you a part of the Bureau of
8 Transportation Research, as an additional capacity?

9 MR. BURKETT: No. The law department is completely
10 separate from the Bureau of Transportation Research.

11 CHAIRMAN PAPAN: Okay.

12 ASSEMBLYMAN BERMAN: Mr. Burkett, I'd like for you to
13 take a few moments --

14 MR. BURKETT: Yes.

15 ASSEMBLYMAN BERMAN: -- and educate me on the law in
16 this area.

17 You're not making a case that somehow, because the by--
18 laws of Southern Pacific provide that a certain part of that
19 company will make the decisions in this area, that that would
20 have any effect on the law of California regarding work
21 product?

22 MR. BURKETT: No, not at all.

23 ASSEMBLYMAN BERMAN: Okay. You state in your statement
24 that, "I have full responsibility for making the determina-
25 tion to request a rate increase of 111 percent. It was my
26 decision. On behalf of the company I am the one who took
27 this action."

28 Is that accurate?

1 MR. BURKETT: Well, let me just read again -- and I
2 was very careful in preparing this statement to say exactly
3 what I meant.

4 And I said, at the foot of page one, "The application
5 for the increase in Peninsula fares filed with the California
6 Public Utilities Commission on August 23, 1974, and assigned
7 Docket No. 55131 bears my signature. I assume personal
8 responsibility for the 111 percent increase therein requested."

9 ASSEMBLYMAN BERMAN: Then, later on, you say -- you
10 repeat all that; "I decided that the 111 percent was the
11 maximum increase which could be justified and I, therefore,
12 used that figure in the application."

13 MR. BURKETT: That was my decision as an attorney.

14 ASSEMBLYMAN BERMAN: Well, it's your decision --

15 MR. BURKETT: My decision as an attorney.

16 In the context of a later statement I said that it was
17 my opinion that was the maximum increase on the basis of
18 1974 costs which could be justified before the California
19 Public Utilities Commission. That was at that time my
20 opinion as an attorney and that is my opinion today subject
21 to this one qualification, and that is, we're talking about
22 1974 costs. We all recognize from what has been said --

23 ASSEMBLYMAN BERMAN: Well, I am not trying to get to
24 this question of whether the 111 percent is accurate or not,
25 so let's move to something that is more related to what
26 I'm interested in.

27 MR. BURKETT: Yes.

28 ASSEMBLYMAN BERMAN: You had this opinion as an attorney?

1 MR. BURKETT: Yes.

2 ASSEMBLYMAN BERMAN: Your making of this application,
3 however, was as the authorized representative of Southern
4 Pacific?

5 MR. TAGGART: As attorney.

6 MR. BURKETT: As an attorney for Southern Pacific.

7 ASSEMBLYMAN BERMAN: Well, under the laws -- and I am
8 very unfamiliar with this, so I don't mind you trying to
9 explain this to me -- you're coming to the Public Utilities
10 Commission and saying that, "We're applying for and will sus-
11 tain the burden of showing that we are entitled to a 111
12 percent increase"?

13 MR. BURKETT: That is right. And here it might help
14 you if I were to simply draw an analogy between this and
15 a personal injury case where a man has a broken leg. And
16 the attorney will make the decision, often, or usually that
17 in the prayer he is going to ask for "X" thousands of dollars,
18 which sets the maximum which the jury can award.

19 ASSEMBLYMAN BERMAN: And it's your claim that is not the
20 client's prayer, that is the attorney's prayer?

21 MR. BURKETT: Well, here again, it's my experience as
22 an attorney that, although the client concurs, those decisions
23 are usually that of the attorney. And I think most attorneys
24 in determining the dollar amount to be set forth in a prayer
25 in a personal injury case reviews the medical records, he
26 reviews the hospital bills, he reviews what his own experi-
27 ence represents as a proper reimbursement for pain and
28 suffering and, then, he will draft the complaint on that

1 basis.

2 ASSEMBLYMAN BERMAN: Very good. All right. And are you
3 saying, then, at that point that the individuals who have a
4 responsibility to make judgments about the validity of that
5 claim have no leeway to investigate the basis for it either
6 through discovery or through cross-examination at trial?

7 MR. BURKETT: Well, now, we're talking about two
8 different things.

9 As far as discovery is concerned, it is my view that,
10 getting back to the personal injury case, if a personal
11 injury lawyer seeks \$100,000 in his prayer and he has in his
12 files work papers, in his working files, opinions from
13 various physicians and surgeons concerning the prognosis,
14 concerning the pain and suffering, I would say that those
15 papers he has in his file, as determined by the California
16 courts, constitute part of his work product.

17 ASSEMBLYMAN BERMAN: And if, in fact, the work sheets
18 that you have would impeach, for some reason, or the Public
19 Utilities Commission staff or members or other people
20 authorized to investigate, believe that those work sheets
21 might impeach the validity of your claim, it is your
22 contention that you have some right to withhold that informa-
23 tion from the people charged with the responsibility for
24 determining the validity of your claim?

25 MR. BURKETT: Well, I think you have to answer that
26 question two ways.

27 Certainly, in a proceeding before the California Public
28 Utilities Commission or a proceeding in the court, I am

1 confident that these work sheets which were handed to me
2 by Mr. Banks in July would never have to be produced by me.

3 What I'm objecting to now is being forced to produce
4 before this subcommittee material which I used in the
5 preparation of my case which would never -- which, I assure
6 you, that neither the Public Utilities Commission nor any
7 court under the California law could require me to produce.

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1 ASSEMBLYMAN BERMAN: The problem that I am having is
2 understanding what appears to me to be a rather self-serving
3 distinction that you're making that you are the attorney
4 but that you are also the party.

5 "I am responsible for deciding --"

6 MR. BURKETT: No.

7 ASSEMBLYMAN BERMAN: Let me just finish.

8 "I am responsible for deciding that 111 percent is the
9 appropriate increase to make. I am making the application.
10 I am signing it. I, therefore, bear responsibility for it."

11 But, then, when we get into the questioning all of a
12 sudden you are the attorney and you are involved in work
13 product and you want to assert all the things that an
14 attorney could assert rather than the principal which you
15 appear to be when you're filing the application. It's an
16 interesting distinction. Maybe it has a great deal of
17 validity in these type proceedings that I don't know of. I
18 have never heard an attorney in a PI case saying, "I am
19 claiming \$100,000. I bear full responsibility for filing
20 this lawsuit."

21 I have never heard a PI attorney say that.

22 MR. BURKETT: Let me say this: I think you have
23 misconstrued what I have said. I have not attempted to do
24 anything more than any attorney would do. If I am in error
25 as to what you consider other attorneys would do, I
26 apologize. However, I consider that when an attorney in a
27 personal injury case files a complaint in the Superior Court
28 and asks for a particular prayer that the court would expect

1 him to stand behind that with appropriate evidence. If I
2 had no evidence I think that he might be subject to censure.

3 I want to assure you that everything I have done in
4 both the employment of Mr. Banks, the various decisions which
5 I privately made concerning the strategy I was going to
6 follow in litigation, the matters which I never thought I
7 would have to in any case make public, in all of those I
8 was acting as an attorney. And in the drafting of the
9 application I was presenting as 111 percent the maximum
10 increase which I knew, as an attorney, the evidence might
11 justify.

12 ASSEMBLYMAN BERMAN: Let me try it in a different way.

13 If you were the president of Southern Pacific and you
14 were not an attorney, but as the president, and you made
15 this application, could you, as president of the company,
16 not as an attorney, assert this privilege in the fashion that
17 you're doing so now?

18 MR. BURKETT: Well, now, this raises particular points,
19 but maybe I can answer the question this way by saying that
20 I assert this privilege because I am an attorney and that
21 this material was prepared for me by an attorney, and it was
22 prepared for me for use in this gathering of data to be used
23 in litigation before the California Public Utilities
24 Commission and on review to the California Supreme Court and
25 the United States Supreme Court.

26 ASSEMBLYMAN BERMAN: Is your understanding of the
27 law one that would permit the president of Southern Pacific
28 filing the applications as chief officer of that company and

1 not being an attorney to do what you're doing here now?

2 MR. BURKETT: Well, now, we're getting into a hypothetical
3 situation.

4 ASSEMBLYMAN BERMAN: That's right.

5 MR. BURKETT: But you get into a second privilege which
6 is entirely distinct, and that is the attorney-client
7 privilege.

8 ASSEMBLYMAN BERMAN: Which the client can assert.

9 MR. BURKETT: That's right. That is, if I give advice
10 to a client -- and I consider officers of the Southern
11 Pacific my clients, and the courts have so held -- I consider
12 that my legal advice to them and their legal questions to me
13 fall within the attorney-client privilege.

14 ASSEMBLYMAN BERMAN: What if we're not asking the client
15 for --

16 MR. BURKETT: I know, but your question was directed to
17 the president of Southern Pacific here.

18 ASSEMBLYMAN BERMAN: Right.

19 MR. BURKETT: And I was assuming that that -- of course,
20 if the president -- and this is very hypothetical -- if the
21 president of Southern Pacific had done this all on his own
22 without consulting an attorney -- your question is rhetorical
23 -- of course, he has no privilege.

24 ASSEMBLYMAN BERMAN: And what if the attorney, instead
25 of consulting a lawyer, had consulted an economist or some
26 business expert to determine the cost and effect on
27 patronage of the revenue increase and the total cost of this
28 whole operation and received information, statistical

1 information, from that economist regarding the proprieties and
2 the effects of a variety of different types of rate increases,
3 would that be privileged?

4 MR. BURKETT: Yes, sir. And the California courts have
5 so held with respect to attorneys who have retained experts,
6 including physicians and surgeons, to make reports.

7 ASSEMBLYMAN BERMAN: This is the president of Southern
8 Pacific retaining an economist, not an attorney retaining
9 him.

10 MR. BURKETT: Here again, if we assume the attorneys are
11 completely out and the attorneys are not consulted in any way,
12 this work product privilege does not apply.

13 I think it's clear from the Code that the work product
14 privilege applies only to attorneys.

15 CHAIRMAN PAPAN: Now, I would like to --

16 Are you through, Mr. Berman?

17 ASSEMBLYMAN BERMAN: Yes.

18 CHAIRMAN PAPAN: Have you researched this privilege and
19 right to privilege before a committee of the legislature?
20 And what is the law on that?

21 MR. BURKETT: I don't know.

22 CHAIRMAN PAPAN: But, yet, you --

23 MR. BURKETT: I know what the law should be, but --

24 CHAIRMAN PAPAN: Might you reflect on that, sir?

25 MR. BURKETT: All right. I reflect on it by saying
26 this, that I don't think a legislative subcommittee should be
27 permitted to do indirectly what neither any court in Califor-
28 nia nor the Public Utilities Commission could do directly.

1 I feel that I, as an attorney, was given certain safeguards
2 by the legislature, and in my -- I'd like to read one other
3 thing from --

4 CHAIRMAN PAPAN: What section of the law, for the
5 record, are you making reference to on that last statement?

6 MR. BURKETT: Very good. I will read that to you, if
7 I may, please.

8 I'm referring specifically to Section 2016 of the
9 California Code of Civil Procedure, which reads, "The work
10 product of an attorney shall not be discoverable unless the
11 court determines that denial of discovery will unfairly
12 prejudice the party seeking discovery in preparing his claim
13 or defense or will result in an injustice in any right that
14 reflects an attorney's impressions, conclusions, opinions or
15 legal research or theories shall not be discoverable under
16 any circumstances."

17 And the courts have held that that section does include
18 materials such as Mr. Banks prepared for me.

19 CHAIRMAN PAPAN: Now, in this instance you originally
20 stated that before a committee of the legislature you didn't
21 know what the law was as affecting privilege.

22 MR. BURKET: Well, maybe I should modify that statement
23 by saying that I have an opinion as to what it should be.

24 CHAIRMAN PAPAN: Yes. I think that was made clear,
25 Mr. Burkett.

26 We, as a legislative body, are not conducting a PUC
27 hearing, so that you're exercising privilege as you would
28 before that body is considerably different in that

1 instance and, also, since we are not a part of a litigation,
2 I have great reservations about whether this kind of
3 privilege that presently exists in a PUC hearing or in
4 litigation applies in a committee hearing of the legislature.

5 MR. BURKETT: Let me try to help you, then, if I may,
6 please.

7 CHAIRMAN PAPAN: Sure.

8 MR. BURKETT: And that is, just as a matter of fairness
9 and equity, anything that I produce before this subcommittee
10 will probably be made public. It probably will be used in
11 the many months to come in the proceedings before the
12 California Public Utilities Commission in this very proceed-
13 ing.

14 In other words, there is no way by which anyone, by
15 discovery or depositions or subpoena, could ever secure this
16 material in a process of the condition or the courts, but if
17 I am compelled to make this material public, then, I'm losing
18 the protection which the legislature intended me to have.

19 CHAIRMAN PAPAN: Mr. Burkett, I would like, at this
20 point -- and I'm going to hold the questions from the
21 members until we hear from legislative counsel as to what
22 research has shown and what protections for the sake of the
23 members on the committee, as to where we are on the legal
24 question.

25 Howard, if you could hold up leaving, I'd most
26 appreciate it.

27 ASSEMBLYMAN BERMAN: I'm not leaving.

28 MR. ASHFORD: I am James L. Ashford, Deputy Legislative

1 Counsel, State Capitol, Sacramento.

2 MR. BURKETT: It is our tentative conclusion on the
3 matter that the work product protection provided by Section
4 2106 of the Code of Civil Procedure has not, in any case,
5 been applied in the case of a legislative hearing where a
6 legislative body is investigating matters for the purpose of
7 determining whether or not legislation should or should not
8 be enacted. I am not aware of any instance in which work
9 product has been applied in this hearing.

10 CHAIRMAN PAPAN: Were you aware of that, sir?

11 MR. BURKETT: At the expense of repeating, this is a
12 question of balancing broad equities and broad privileges.

13 As a member of the Bar I have been given certain
14 protection in litigation over the years. Certainly, if I
15 came before this committee and you were asking me to produce
16 work product -- let me state it differently.

17 -- work product was not relevant to some pending
18 litigation, but the thing that I think is inequitable and
19 unfair is that we have a formal proceeding now going on
20 before the California Public Utilities Commission. There is
21 no way by which depositions can be taken. There is no way
22 by which discovery can be used. And I will tell you that I
23 feel that my function as an attorney is prejudiced if I am
24 now required to produce those work sheets. And I ask you,
25 please, to balance the other side. What advantage is there
26 to the security? As I have said in my statement, these are
27 work sheets. There is no report. These are work sheets
28 which are not final. These are work sheets which were

1 prepared for me and for my use. I don't know how those
2 work sheets are going to be of any great value to this
3 committee drafting legislation. It's just beyond me.

4 - - -

1 CHAIRMAN PAPAN: I would like to shed some light on
2 that last statement that the legislature does appropriate
3 money for public transportation.

4 It may consider appropriating money to upgrading a
5 service that your company presently provides.

6 Much of our thinking goes to the practices the company
7 presently, and the impact of those practices, on a corridor
8 that provides commuter service.

9 This, in a very general sense, is a legislative concern
10 that this committee is looking into.

11 MR. BURKETT: May I reply to that, please?

12 CHAIRMAN PAPAN: Surely.

13 MR. BURKETT: I think if that is the concern, this is
14 premature.

15 We have to remember that we filed this application in
16 August of 1974. At a pre-hearing conference which was held
17 in this building, the staff of the California Public Utilities
18 Commission stated it wouldn't even be ready to go to hearing
19 for a period from some ten to fourteen months.

20 I am not going to comment on the propriety of that at
21 this time.

22 The hearing at which the hundred and eleven percent
23 would be considered by the commission is, obviously, as far
24 as the commission staff is concerned -- and I assume the
25 commission, as it so often does, notwithstanding what
26 Mr. Bennet says, goes along with the recommendations of
27 the staff.

28 I don't think we are going to have a hearing before

1 this commission until the Fall of 1975. I don't think we
2 will ever get a decision from this commission on our hundred
3 and eleven percent until 1976.

4 So, therefore, I say that this is premature at this time,
5 and all that I request Mr. Banks to do -- and let's make
6 it very clear -- I requested him to do one thing and one
7 thing alone, and that was to show the effect of fare increases
8 on gross revenues.

9 CHAIRMAN PAPAN: Mr. Lockyer.

10 ASSEMBLYMAN LOCKYER: Well, I am one member that perhaps
11 shares some of your concern, perhaps for different motives
12 about the authority and purview of a legislative committee.

13 Having, as a young fellow, but actively concerned,
14 worried through witch hunts of the Fifties by the bad guys,
15 I don't think we want to encourage witch hunts by the good
16 guys twenty years later.

17 But I want to get at a different problem, and one that
18 still puzzles me: I, frankly, cannot quite understand why
19 you, as an attorney, are making what seems to me to be
20 principally an economic decision; that is, are you an
21 accountant or an economist or what kind of background or
22 expertise do you have to make a very complicated economic
23 decision as an attorney?

24 MR. BURKETT: I am not an economist, I am not an
25 accountant.

26 The decision I made was purely a decision of law.

27 The decision of law that I have made is that the maxi-
28 mum increase we could and should request in our formal

1 application is 111 percent.

2 I don't know what the evidence will finally show.

3 Of course, we hope that we will justify a 111 percent.

4 But I know from long experience that here again, not-
5 withstanding the statement which has been made about the
6 fact that the California Public Utilities Commission always
7 rubberstamps everything we want, I know that I have lost
8 cases.

9 I have proposed increases, and I haven't gotten a
10 cent. I have proposed other increases in applications,
11 and a year and a half or so later I have gotten a half of
12 loaf.

13 But I do feel -- and I think it is not an economic
14 decision, it is not an accounting decision -- I do feel
15 it's a question of law, and that law is based on one thing
16 and one thing alone, and that was on the basis of our 1974
17 costs which were given to me.

18 It was a mathematical calculation that to cover those
19 1974 costs, our rates would have to be increased 111 percent.

20 ASSEMBLYMAN LOCKYER: Is Mr. Banks in Washington, D. C.,
21 a lawyer?

22 MR. BURKETT: No, sir.

23 ASSEMBLYMAN LOCKYER: What is he?

24 MR. BURKETT: He is an economic consultant.

25 ASSEMBLYMAN LOCKYER: And so you sought an economic
26 consultant to make a legal decision?

27 MR. BURKETT: No, I did not ask him to do that.

28 I asked him to make a factual decision. I asked him

1 to make a factual decision as to the effect that rate in-
2 creases on our peninsula service would have on our gross
3 revenues.

4 It was not a legal decision in any sense. It was a
5 factual decision.

6 ASSEMBLYMAN LOCKYER: It just strikes me it is a very
7 convenient dodge to have an attorney who can rely on privilege
8 and confidentiality in making economic decisions claiming
9 legal privilege.

10 You know, I can't fault that method, procedural system.
11 I suppose it just seems to me to be not necessarily consistent
12 with the public interest.

13 MR. BURKETT: Well, maybe I have been misunderstood,
14 but I want you to know that I can unequivocally state that
15 I have never pretended, I have never assumed to make any
16 economic decisions.

17 And as long as I am a member of the bar, I will not
18 make economic decisions. I will only make legal decisions.

19 The legal decisions that I made as an attorney was that
20 111 percent could be justified.

21 I needed to have certain evidence which I might have
22 to present. I needed to develop certain facts.

23 I didn't know what all the facts might be. I think any
24 lawyer who prepares a lawsuit, whether it be eminent domain,
25 whether it be slander, whether it be personal injury, a dili-
26 gent lawyer follows all leads.

27 This was a lead for possible evidence which I followed.

28 ASSEMBLYMAN LOCKYER: Thank you, Mr. Chairman.

1 CHAIRMAN PAPAN: Just one question to clear the record:
2 When you talk about gross receipts, do you have any difficulty
3 in your thinking as to whether those gross receipts are
4 reflective of patronage?

5 MR. BURKETT: Yes.

6 CHAIRMAN PAPAN: Then, we are talking about --

7 MR. BURKETT: It necessarily follows that you can't
8 make studies of gross revenues without patronage. That is
9 obvious.

10 CHAIRMAN PAPAN: Fine.

11 Assemblyman Arnett?

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1 ASSEMBLYMAN ARNETT: Sir, let me try to separate the
2 difference between lawyers and people, because apparently
3 there is some kind of a difference, a distinction that you
4 are making.

5 Now, didn't it occur to you that when you filed for
6 111 percent, that eyebrows might go up, and it might be
7 bad PR for the Southern Pacific Company, and that somebody
8 might question that, whether it be legislators or whether
9 the press or anyone else? Didn't it occur to you that you
10 might advise the chief policy maker of the Southern Pacific
11 Company in a normal conversation that you might be in this
12 kind of inquiry?

13 MR. BURKETT: No, sir.

14 ASSEMBLYMAN ARNETT: Why not?

15 MR. BURKETT: I will tell, because we have met other
16 increases where we were seeking similar percentages today.

17 ASSEMBLYMAN ARNETT: You mean the 35 to 45 --

18 MR. BURKETT: In October, 1974, there is being a hearing
19 held in courtroom No. 15 at the old post office at 7th and
20 Mission Streets where the railroads of the country are pro-
21 posing freight increases in grapes and deciduous fruits
22 nationwide of 105 percent.

23 ASSEMBLYMAN ARNETT: So, in other words, it is becoming
24 a habit?

25 MR. BURKETT: I do not think it is a question of be-
26 coming a habit. I think the railroads and all industries
27 have to look today at certain areas where we, as a regulated
28 industry, must cover our costs.

c 1 Now, the difference between the utilities and the
2 private businesses is that we can't afford in any sense
3 a lost leader.

4 All of our rates are subject to control. All of our
5 rates are subject to a maximum. There is no pot of gold.

6 ASSEMBLYMAN ARNETT: So, in other words, if you had
7 the opportunity to advise the chief policy maker of your
8 company, which you may or may not have taken with respect
9 to the public relations aspects of this thing, you would
10 not have advised in the negative?

11 MR. BURKETT: No, sir.

12 ASSEMBLYMAN ARNETT: Because you think that this is
13 something that railroads have earned in some way?

14 MR. BURKETT: No, sir, and I don't think it is unique
15 to railroads.

16 I remember in 1952 when I lived in San Francisco that
17 I paid five cents for a daily paper. I know that in that
18 year the price was increased to ten cents, a hundred percent
19 increase.

20 I know today that the price of newspapers -- and I
21 gladly pay it -- is twenty cents. In other words, we have
22 had a 400 percent increase in the price of newspapers in
23 the last two years.

24 ASSEMBLYMAN ARNETT: That is 22 years --

25 MR. BURKETT: Yes, sir.

26 ASSEMBLYMAN ARNETT: But you are asking 111 percent all
27 in one jump.

28 MR. BURKETT: But the newspaper increase in 1952 was

1 100 percent in one jump.

2 ASSEMBLYMAN ARNETT: Let me ask you a people-type ques-
3 tion, not a lawyer-type question. I am not a lawyer, so
4 I can't play that kind of a game. Don't you think that a
5 certain amount of this is posturing before the Public
6 Utilities Commission; that you come in, and you ask for
7 a little bit more -- or maybe a whole lot more than what
8 you expect to get, and if you get over the two-year period
9 a kind of jostling and negotiation, and all the lawyers
10 earn their fees, and they are happy, you end up in the
11 end result somewhere where you might have been if you
12 really started out as people in the beginning instead of
13 posturing lawyers?

14 MR. BURKETT: I assure you, sir, that is not the way
15 I practice law.

16 I have never made a claim before any commission or
17 any court that I did not feel I could substantiate by evi-
18 dence.

19 I want to dispell any thought that I was a party to
20 any jockeying.

21 I felt as an attorney, and I have tried to explain
22 it on the basis of 1974 costs, which I expect. I am not
23 a cost man. I am not an economist.

24 But we have to have a 111 percent increase to meet
25 our costs.

26 ASSEMBLYMAN ARNETT: A few moments ago it seemed to
27 me that you drew the parallel between what you are doing
28 here and a pain and suffering kind of figure in a pleading

1 before a court, and you talked there about, it seemed to
2 me, posturing oneself as a lawyer in court as to an amount
3 of money which one attaches to pain and suffering.

4 Now, you drew that analogy, I didn't. How do your
5 last comments balance with the analogy which you drew?

6 MR. BURKETT: My case is much stronger than that case.
7 In that case I was conceding that the attorneys, acting
8 according to the highest legal ethics in his own mind,
9 could put a dollar amount on pain and suffering. I don't
10 think he can.

11 But I do know in this case I can present a dollar
12 and cents justification for 111 percent increase, just as
13 in the personal injury case hospital bills paid and doctor
14 bills paid are real damages.

15 ASSEMBLYMAN ARNETT: You and I have a disagreement. Let
16 me suggest to you, sir, that one of the legislative interests
17 that might be a product of this committee, and it would be
18 a legitimate product, in my opinion, this committee, is
19 whether or not, in fact, all proceedings that we now have
20 under the law and under the constitution before the Public
21 Utilities Commission, is really worth a damn.

22 MR. BURKETT: I would like to draw --

23 ASSEMBLYMAN ARNETT: And that is a legitimate interest
24 on our part, it seems.

25 MR. BURKETT: As I said in my prepared statement, we
26 have a much more difficult task to secure authority to
27 increase rates or fares in California than we have in most
28 other states, including Oregon, Nevada, Utah, New Mexico,

1 Texas and Louisiana.

2 ASSEMBLYMAN ARNETT: Those are the states in which you
3 have the privilege of doing business, and therefore you
4 appear as rate controllers in those states.

5 MR. BURKETT: Yes, sir.

6 ASSEMBLYMAN ARNETT: Did you ask for 111 percent in each
7 of those other states or 105 percent in freight categories?

8 MR. BURKETT: We are today. We are today asking for
9 105 percent increase in the rates on grapes and deciduous
10 fruits throughout the United States.

11 Now, the reason I testified to those other states is
12 that there we didn't have -- and what I am trying to do
13 is, I am trying to bring home to you the fact that I asked
14 for 111 percent.

15 We are not in the position here where we can file a
16 tariff.

17 If I were in Oregon or in Nevada, I wouldn't have to.
18 We have the right to file a tariff subject to suspension for
19 a limited time.

20 Here in California we can't file the tariff until after
21 we have gone through months or years of proceedings before
22 the California Commission and in the courts.

23 CHAIRMAN PAPAN: Mr. Arnett, would you wind it up?

24 ASSEMBLYMAN ARNETT: Yes. Just for the record, to put
25 the balance in the thing, what were the profits of the
26 Southern Pacific Company in the last fiscal year?

27 MR. BURKETT: Yes, during the twelve months ended June
28 30, 1974, we had a rate return of less than 3 percent on our

1 invested capital.

2 ASSEMBLYMAN ARNETT: What was the profit?

3 MR. BURKETT: I don't have the figure, but the rate of
4 return, which is to me the significant thing, is less than
5 3 percent.

6 CHAIRMAN PAPAN: The profit was in excess of \$100,000,000.

7 MR. BURKETT: I don't know.

8 CHAIRMAN PAPAN: Are you through, Mr. Arnett?

9 ASSEMBLYMAN ARNETT: Yes.

10 - - -

1 CHAIRMAN PAPAN: Mr. Burkett, my concern is that we resolve
2 as a committee, before I lose some of the members who have to
3 catch airplanes, the question of the study.

4 When in fact you referred to the study as your work papers,
5 you testified that you did not know what the law was with
6 regard to privilege before a legislative committee.

7 MR. BURKETT: I'm trying to modify that statement.

8 CHAIRMAN PAPAN: That is not a question. Let me finish,
9 sir.

10 The attorneys for the state indicate that the papers --
11 although having attempted to research the law, we weren't
12 able to establish any precedents.

13 I would like to ask you, Mr. Burkett, do you have the
14 papers?

15 MR. BURKETT: Yes sir.

16 CHAIRMAN PAPAN: Are you prepared to furnish this
17 committee those papers?

18 MR. BURKETT: My position is this, and I think Mr. Taggart
19 can advise on this as my attorney better than I.

20 Will you, please?

21 MR. TAGGART: Mr. Papan, the attorney for the State of
22 California has just stated that he has researched the subject
23 and has found that there are no cases directly on point.

24 I believe I am correct, sir, in your -- now, it is --

25 CHAIRMAN PAPAN: That is true.

26 MR. TAGGART: That is fine. So we are in agreement on
27 that score.

28 I think there is no disagreement that the material that

1 was produced for Mr. Burkett was not produced in relation to
2 this hearing.

3 CHAIRMAN PAPAN: Excuse me, sir, I am going to interrupt
4 you and put you under oath.

5 ROBERT W. TAGGART
6 having been first duly sworn, testified as follows?

7 CHAIRMAN PAPAN: May we start from the beginning?

8 MR. TAGGART: Yes. To reiterate, counsel for the State
9 of California has stated that there are no cases directly
10 on point for which precedents can be found.

11 It is also, I believe, without dispute that this material
12 was commission by Mr. Burkett for use at a hearing before the
13 Public Utilities Commission.

14 It was not requested for any other reason or for any
15 other purpose but solely to be used for that hearing.

16 It is also clear, and I believe that counsel will agree,
17 that The Code of Civil Procedure, Section 2016, and The
18 Public Utilities Code, Section 1794, clearly would protect
19 this material under the attorney's work product privilege
20 should that material be requested by the Public Utilities
21 Commission committee.

22 I should state that I again call your attention and
23 counsel's attention to the basic code section, code Section
24 2016, which states, "That it is the policy of this state to
25 preserve the rights of attorneys to prepare cases for trial
26 with that degree of privacy necessary to encourage people to
27 prepare their cases thoroughly," et cetera.

28 I submit, Mr. Papan, that if there is no case directly on

1 point when it is agreed that the material was produced for
2 one specific purpose, and that that material could not be
3 discovered by the Public Utilities Commission, then it would
4 be contrary to the express policy of the State of California
5 for you to circumvent and run roughshod over these well
6 established legal principles.

7 CHAIRMAN PAPAN: Mr. Taggart, you don't say the case that
8 precludes us from asking for the materials; is that correct,
9 sir?

10 MR. TAGGART: I have found no such case, and I believe
11 that counsel for the state has stated that he has found no
12 such case.

13 And I submit, sir, that that in such an instance you
14 must then rely on the expressed policy of the state.

15 You always go for a specific, if you can find it, but
16 if you can't find a specific, then you have to go on established
17 legal principles, and if you can find it, the expressed policy
18 of the state to rely upon what decision you are going to come
19 to.

20 ASSEMBLYMAN BERMAN: And, pray tell, what policy of the
21 state justifies to no other position the conclusion you are --

22 MR. TAGGART: Yes sir, the policy of the state is stated in
23 The Civil Procedure Code Section 2016, and that is on page four
24 of Mr. Burkett's statement. I believe you have a copy in front
25 of you.

26 And it says, "It is the policy of the state to preserve
27 the rights of attorneys to prepare cases for trial with that
28 degree of privacy necessary to encourage them to prepare their

1 cases thoroughly and to investigate not only the favorable but
2 the unfavorable aspects of such cases and to prevent an attorney
3 from taking undue advantage of his adversaries."

4 That is the expressed policy of the state.

5 Now, I grant you that the committee is not an attorney,
6 but certainly the principle is very clear. It is a good
7 principle, I submit, and I submit that it is an admirable
8 principle, and I submit that it would be extremely dangerous
9 to take a chance on establishing a precedent that would be
10 contrary to this principle, which attorney daily rely upon not
11 only in hearings of this sort but in every type of proceeding,
12 both legislative, administrative and judicial. That is the
13 danger I say that is presented here, sir.

14 And I believe those are the weights that you should
15 place on any benefit that could possibly be gained by pressing
16 this matter further.

17 ASSEMBLYMAN BERMAN: I think first of all what you have
18 said assumes what you are arguing, and that is that in fact
19 what you have and apparently are not prepared to turn over,
20 although I am not sure that has really been directly answered
21 yet, is the work product, and that that work product does and
22 should apply to this type of proceedings?

23 MR. TAGGART: Well, that, of course, sir, is something
24 that Mr. Burkett has testified to under oath, and obviously
25 that is a question that is up in the air now. If it wasn't
26 we wouldn't be sitting here talking about it.

27 MR. BURKETT: So there will be no question about it --
28 and I am under oath -- I will say that these are only work

1 papers which were prepared for me at my request, and there are
2 decisions which would clearly indicate, clearly establish that
3 if this proceeding were being held before a court or before
4 The California Public Utilities Commission, I would not have
5 to produce those papers.

6 ASSEMBLYMAN BERMAN: You stated that two or three times
7 authoritatively.

8 CHAIRMAN PAPAN: There is a section of The Public Utilities
9 Code, and I want to read that into the record, which says,
10 "The commission may require by order served on any public
11 utility the production within this state at such time and place
12 as it designates of any books, accounts, papers or records
13 kept by the public utility at any office or place without the
14 state or at its option verified copies in lieu thereof so the
15 examination thereof may be made by the commission or under
16 its direction."

17 MR. BURKETT: But that general proposition is specifically
18 amended by Section 1794 of The California Public Utilities
19 Code which very specifically carries forward into proceedings
20 before The California Public Utilities Commission, and has
21 been recognized in a decision of The California Public
22 Utilities Commission that that privilege is applicable.

23 That particular decision which I would like to give you,
24 please, is better known.

25 ASSEMBLYMAN BERMAN: You said there was a specific
26 amendment to some other section of The Public Utilities Code
27 which I just turned to, and perhaps I have an antiquated
28 version of the code, but I don't see it modifying the provi-

1 sion that I read by this work product.

2 MR. BURKETT: I am talking about Section 1795, 1794, and
3 that has been specifically applied to California work products
4 in the following decision, which I will give you in a moment.

5 CHAIRMAN PAPAN: Mr. Burkett, would you like to still --

6 ASSEMBLYMAN BERMAN: I would like to answer the question.
7 The reference which I make where The California Public
8 Utilities Commission specifically applied that rule was in
9 re Southern Pacific Company, 68 PUC 322, decided in the year
10 1968, and that decision has not been altered on review, and
11 it has been followed to the best of my knowledge, by the
12 California Public Utilities Commission every since.

13 CHAIRMAN PAPAN: Mr. Burkett and Mr. Taggart, the
14 commission committee requests those papers.

15 MR. TAGGART: Mr. Papan, I raise the attorney's work
16 product privilege and hereby officially assert that privilege.

17 Here again, I would like to point out that there is no
18 question under the California cases that the written or
19 oral statements made by an outside consultant to an attorney
20 who has retained the consultant for assistance in preparing
21 the case, the attorney's cases are considered a part of the
22 attorney's work product.

23 This is in partial answer to Mr. Berman's early cases.

24 I do have substantial case authority to back up that
25 statement to be law, and I think that counsel will agree,
26 counsel for the state will agree.

27 So, Mr. Burkett has obeyed your subpoena. He is present.
28 He has the work papers with him. I hereby officially raise

1 the attorney's work product privilege pursuant to The Code of
2 Civil Procedure and The Public Utilities Code sections.

3 CHAIRMAN PAPAN: This committee will stand adjourned for
4 lunch until 2:00 o'clock.

5 [Luncheon recess]

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COPY

ASSEMBLY TRANSPORTATION SUBCOMMITTEE HEARING

Thursday, October 31, 1974

Afternoon Session - 2:00 o'clock p.m.

State Building
455 Golden Gate Avenue
San Francisco, California

Chairman: Louis J. Papan

Pages 65 - 136

HARRY A. CANNON, C. S. R.

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1 THURSDAY, OCTOBER 31, 1974

2:00 O'CLOCK P.M.

2 - - -

3 CHAIRMAN PAPAN: It's 2:00 o'clock, and this meeting is
4 reconvened.

5 We have Mr. Burkett and Mr. Taggart back. And at this
6 point Mr. Berman will proceed with the questioning of the
7 witnesses.

8 MR. TAGGART: Mr. Papan, I would just like to point out,
9 in reviewing the testimony that was made prior to the lunch-
10 eon recess, I would like to make the observation that, al-
11 though the committee has requested that the working papers
12 be turned over, the committee has not ordered that the
13 papers be turned over at this point. At least, that is my
14 understanding.

15 CHAIRMAN PAPAN: It's so stipulated.

16 MR. TAGGART: And I should also like to state that
17 prior to the luncheon recess I agreed to consider the
18 request of the committee in regard to the price charged by
19 Mr. Banks for the study, and I have considered that, and I
20 would like to advise the committee that I will determine
21 what the price or the price tag, if you will, attached to
22 Mr. Banks' report is and I will advise the committee in
23 writing as soon as I have made this determination.

24 CHAIRMAN PAPAN: Thank you, sir.

25 ASSEMBLYMAN BERMAN: You will ascertain it? You won't
26 determine it?

27 MR. TAGGART: Very well, Mr. Berman. I assume that it
28 is not a negotiable item.

1 ASSEMBLYMAN LOCKYER: Well, the attorneys do a lot in
2 this company. You see, we thought maybe as the attorney for
3 the attorney that you would determine it.

4 ASSEMBLYMAN BERMAN: These working sheets that you
5 described in your testimony, you understand those to be
6 material that the committee intended to obtain through its
7 subpoena that was issued to you?

8 MR. BURKETT: Yes, sir.

9 ASSEMBLYMAN BERMAN: So that there is no ambiguity or question
10 of vagueness with respect to what was subpoenaed, what you
11 have produced is, in fact, what the committee sought?

12 MR. BURKETT: Yes, sir.

13 ASSEMBLYMAN BERMAN: Yes, sir, there is no vagueness,
14 I gather?

15 MR. BURKETT: I concur in the statement you have
16 just made.

17 ASSEMBLYMAN BERMAN: How many work sheets are there?

18 MR. BURKETT: There are 13 work sheets.

19 ASSEMBLYMAN BERMAN: And how did Mr. Banks transmit
20 these work sheets to Southern Pacific?

21 MR. BURKETT: He handed them to me personally in his
22 office in Washington, D.C. on the morning of July 9, 1974
23 when I dropped by on the way to another meeting. I would
24 say, probably, it was around 9:00 a.m.

25 ASSEMBLYMAN BERMAN: And were they accompanied by any
26 cover letter?

27 MR. BURKETT: No, sir.

28 ASSEMBLYMAN BERMAN: Were they enclosed in an envelope?

1 MR. BURKETT: No, sir.

2 ASSEMBLYMAN BERMAN: How many sheets would you say --
3 13?

4 MR. BURKETT: I said there were 13.

5 ASSEMBLYMAN BERMAN: 13 sheets was the entire context of
6 the documents he handed to you?

7 MR. BURKETT: Yes, sir.

8 ASSEMBLYMAN BERMAN: Who selected Mr. Banks to perform
9 this work?

10 MR. BURKETT: I personally did.

11 ASSEMBLYMAN BERMAN: Was there any kind of written
12 instructions to him with respect to what his charge was?

13 MR. BURKETT: No, sir.

14 ASSEMBLYMAN BERMAN: You communicated to him verbally?

15 MR. BURKETT: I communicated to him verbally.

16 ASSEMBLYMAN BERMAN: Was there any correspondence
17 between the two of you regarding the nature of the work he
18 was to perform?

19 MR. BURKETT: Not between me and Mr. Banks, no.

20 ASSEMBLYMAN BERMAN: Between Mr. Banks and any other
21 employees of Southern Pacific?

22 MR. BURKETT: Yes, I believe there was.

23 ASSEMBLYMAN BERMAN: Are you familiar with the nature
24 of that correspondence?

25 MR. BURKETT: Oh, very generally.

26 ASSEMBLYMAN BERMAN: Would you tell that to us?

27 MR. BURKETT: Generally, Mr. Banks did request one of
28 our other officers to provide him certain raw materials he

1 might use in the preparation of his study.

2 ASSEMBLYMAN BERMAN: Who was that individual?

3 MR. BURKETT: Shall I tell him that?

4 I think that comes within the attorney-client
5 privilege.

6 ASSEMBLYMAN BERMAN: The name of the employee?

7 MR. BURKETT: I will give you the name, yes. The name
8 of the employee was George Housman, Manager. He has the
9 title of Manager, Commute Service.

10 ASSEMBLYMAN BERMAN: And is he a lawyer?

11 MR. BURKETT: No, sir.

12 ASSEMBLYMAN BERMAN: And the inquiries of Mr. Banks to
13 him was solicitation of certain kinds of raw material on
14 which Mr. Banks would undertake his analysis?

15 MR. BURKETT: Yes, sir.

16 ASSEMBLYMAN BERMAN: What kind of raw material was
17 sought?

18 MR. BURKETT: Well, I think, generally -- I just don't
19 recall.

20 ASSEMBLYMAN BERMAN: You don't have any knowledge of --

21 MR. BURKETT: Well, I have general knowledge. It's
22 material concerning -- oh, I just -- I know the general
23 nature, but --

24 ASSEMBLYMAN BERMAN: What is that general nature?

25 MR. BURKETT: Traffic material.

26 ASSEMBLYMAN BERMAN: Patronage figures you mean or --

27 MR. BURKETT: I believe so.

28 ASSEMBLYMAN BERMAN: Is it your position that the raw

1 material is work product?

2 MR. BURKETT: Oh, yes, definitely. That is, if I
3 retain an expert to do work for me and he has to get raw
4 material from another source, I consider all of that as
5 work product. If the Banks work sheets are work product,
6 well, then, what was furnished him for those work sheets
7 is a fortiori work product.

8 ASSEMBLYMAN BERMAN: I asked you to think about that.
9 You're saying that the raw material, the figures that were
10 provided to Mr. Banks for his analysis, are protected from
11 either commission subpoena or in terms of a particular rate
12 increase or from legislative subpoena in terms of whatever
13 legislative purposes we may be undertaking, that raw
14 material is work product?

15 MR. BURKETT: May I confer with counsel, please?

16 CHAIRMAN PAPAN: You may, sir.

17 [Mr. Burkett and Mr. Taggart conferring.]

18 MR. BURKETT: Much of that material is material which
19 has been publicized many, many times in proceedings before
20 the California Public Utilities Commission.

21 Of course, I concede that that has already become a
22 matter of public knowledge. Without going through the
23 material, I am unable to express any opinion now as to
24 whether or not all of that material is or is not work product.

25 I concede that, probably, the great majority is
26 material which, as I say, has been presented in extensive
27 hearings before the California Public Utilities Commission.

28 MR. TAGGART: And, therefore, would not be subject to

1 the privilege.

2 MR. BURKETT: Yes. That is, it's obvious that we would
3 waive the privilege if we publicize, voluntarily, material.

4 ASSEMBLYMAN BERMAN: Is it your position that there
5 is no distinction between the raw material gathered by
6 Southern Pacific with respect to its operations which are
7 regulated by the Public Utilities Commission and that of a
8 corporation which is not a public utility and not so
9 regulated?

10 MR. BURKETT: Would you read the question, please,
11 or repeat the question?

12 [The reporter read as follows:

13 "Is it your position that there is
14 no distinction between the raw material
15 gathered by Southern Pacific with respect
16 to its operations which are regulated by
17 the Public Utilities Commission and that
18 of a corporation which is not a public
19 utility and not so regulated?"]

20 MR. BURKETT: Well, the only matter with which I am
21 claiming a privilege is not material which is in the files
22 of Southern Pacific. The only thing I was suggesting that
23 the privilege might exist to is with respect to certain
24 requests that Mr. Banks made and the manner in which those
25 requests were complied with.

26 I think it's well known and well recognized that as
27 far as all of our records are concerned, which we keep, that
28 those are subject to inspection by members of the California

1 staff of the Public Utilities Commission. And I can assure
2 you that they have spent the past many days on our
3 property looking at all of that material.

4 The only point I was making is that I felt that if we
5 were to try to sort out from the material that which Mr.
6 Banks had specifically requested that such could appropriately
7 fall within the privilege if they had not been previously
8 publicized, not because they're from our records, but,
9 rather, they were requested by the person preparing the
10 work papers.

11 And I should also add that the work papers had much
12 other material in them in addition to that. That is just
13 one small portion of the material which is developed in the
14 work papers.

15 ASSEMBLYMAN BERMAN: These 13 work sheets?

16 MR. BURKETT: Yes.

17 Which I have in front of me here.

18 ASSEMBLYMAN BERMAN: What other information was
19 relied on in preparing those 13 work sheets?

20 MR. BURKETT: I don't know.

21 ASSEMBLYMAN BERMAN: But you know that there was other
22 material?

23 MR. BURKETT: Well, it's obvious from the sheets that
24 there were.

25 ASSEMBLYMAN BERMAN: What is obvious?

26 MR. BURKETT: Well, here again, I have not yet been
27 ordered to produce the sheets. I think if I were ordered
28 to produce the sheets and if I complied with the order it

1 would be very apparent what the material was.

2 CHAIRMAN PAPAN: Mr. Berman, I am sorry to interrupt
3 you, but in view of the statements that Mr. Taggart has
4 made, and in order that the records so indicate, the
5 chairman of this committee orders you to present the
6 papers provided by R. L. Banks.

7 MR. TAGGART: I assume the chairman will stipulate
8 that my objection previously expressed prior to the noon
9 recess will, again, be made at this time, or do you want me
10 to run through it again?

11 In other words, I do not withdraw my exception and I,
12 again, raise the privilege of attorney's work product.
13 Now, am I being ordered over my specific protest of the
14 attorney work-product privilege to turn those papers over?

15 I just want to understand what you're telling me,
16 Mr. Papan.

17 ASSEMBLYMAN BERMAN: Mr. Chairman, isn't it our
18 position that this privilege or this purported privilege
19 that is asserted is not applicable or appropriate with
20 respect to the material that is being sought and that, there-
21 fore, we, or at least it may be the view of the committee
22 that there is not, in fact, a privilege that protects this
23 material?

24 CHAIRMAN PAPAN: I would be inclined to agree with that
25 statement.

26 ASSEMBLYMAN BERMAN: So that the order is not an order
27 notwithstanding the protective nature of this material to
28 produce it, but not accepting the validity of your objection

1 and your assertion of privilege, an order to produce is
2 being made.

3 MR. TAGGART: My point is that I am asserting the
4 privilege, and I am asking you whether you're overruling my
5 assertion of the privilege applicable, or privileges
6 applicable and, nevertheless, in light and in view of that
7 assertion ordering me to give you the papers?

8 CHAIRMAN PAPAN: I would say yes.

9 MR. TAGGART: You are?

10 CHAIRMAN PAPAN: Yes.

11 MR. TAGGART: And I, then, will, over my protest --

12 MR. BURKETT: Here, let me. I'd like to personally
13 hand them.

14 MR. TAGGART: Mr. Burkett will hand them to you.

15 And I'd like to state, Mr. Papan, that, for the
16 purposes of the record, the information contained therein
17 is extremely confidential in nature, and I would charge the
18 committee to keep the material that has been presented to
19 the committee over our objection in the strictest of
20 confidence without any type of publicity, and I would like
21 your assurance that that material will be kept strictly
22 within the confines of your committee.

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1 CHAIRMAN PAPAN: Mr. Taggart, would you shed some light
2 on the extent of the confidentiality of these papers since
3 R. L. Banks turned them over to you?

4 MR. TAGGART: I don't understand the question, sir.

5 CHAIRMAN PAPAN: For establishing confidentiality,
6 I would like to know the extent of the confidentiality that
7 existed with these papers from the time that you commissioned
8 --

9 MR. TAGGART: I see. I think I see.

10 CHAIRMAN PAPAN: Okay.

11 MR. TAGGART: Mr. Banks was commissioned and the work
12 was done with the specific understanding between Mr. Burkett,
13 the attorney for Southern Pacific Transportation Company and
14 Mr. Banks that the material was strictly confidential, was
15 not to be revealed to any source whatever other than Mr.
16 Burkett and such executives within the company as he would
17 need to confer with to evaluate the study.

18 CHAIRMAN PAPAN: Could you specifically state for me
19 how that confidentiality was effected as confidentiality in
20 the process so that you can give me some idea or some
21 assurance of who has looked at this information, who has had
22 this information, so that I might --

23 MR. TAGGART: Yes.

24 CHAIRMAN PAPAN: -- get some idea as to what you're
25 stating when you speak of confidentiality?

26 MR. TAGGART: Yes. I believe I can shed some light
27 on that.

28 The material contained in the working papers and the

1 working papers themselves have not been made available for
2 inspection or for perusal or any other means to any
3 individuals except three individuals, to my knowledge, who
4 are directly concerned with and connected with the
5 preparation of the proposed fare-increase case before the
6 Public Utilities Commission.

7 Does that answer your question, sir?

8 CHAIRMAN PAPAN: Then, am I to understand from what
9 you have just stated that this information was available to
10 only three people?

11 MR. TAGGART: Well, I say three people. I am not
12 certain in my own mind that four haven't looked at it,
13 but I --

14 ASSEMBLYMAN BERMAN: Are you competent to testify to
15 this as the attorney, or --

16 MR. TAGGART: I believe I am.

17 CHAIRMAN PAPAN: So am I to understand --

18 MR. TAGGART: Certainly, Mr. Papan, whenever a report
19 goes to someone's office I can't say that the individual's
20 secretary, as it went over her desk, didn't see it. I
21 can't say that an individual would have a subordinate working
22 for him who hasn't seen it.

23 I would have personally have had to carry it and take
24 it to and from the office before I could testify in that
25 light.

26 CHAIRMAN PAPAN: On advice of legislative counsel, Mr.
27 Taggart, I cannot and will not give you the assurance of
28 confidentiality of this material.

1 MR. TAGGART: I feel that that is extremely unfortunate,
2 Mr. Papan.

3 ASSEMBLYMAN BERMAN: Mr. Chairman, just a couple of
4 points should be made, as we say, for the record.

5 You, at the point where you provided this material,
6 had other quite legal and proper processes to challenge the
7 validity of the request in light of the privilege you were
8 asserting, isn't that right?

9 MR. TAGGART: My sole challenge to the validity of the
10 order of this committee is to raise the privilege before
11 this committee.

12 Now, if I should raise the privilege before the
13 committee after having been ordered to produce the documents,
14 and if I should then refuse to produce the documents, the
15 committee would hold me in contempt.

16 I do not wish to be held in contempt.

17 ASSEMBLYMAN BERMAN: That is not an accurate statement
18 of what the --

19 MR. TAGGART: Or the committee could say, "Okay, fine,
20 then you don't have to turn them over, but that is not what
21 has happened. I have raised the question of the order --

22 ASSEMBLYMAN BERMAN: I think the contempt issue was
23 inaccurately stated. I think there are two possible ways
24 to test further the issue of this privilege. One would
25 have been to have sought a petition to compel the enforce-
26 ment of this subpoena in the Superior Court, and the other
27 way would have been to go to the legislature in session and
28 to ask for a contempt citation. Either way, in either form,

1 you could have raised this issue of privilege had you wished
2 to.

3 MR. TAGGART: Mr. Berman, the subpoena was complied
4 with by Mr. Burkett's appearance with the papers.

5 ASSEMBLYMAN BERMAN: And the test would have been --

6 MR. TAGGART: And he did comply with the subpoena
7 without any question as to the production or the turning over
8 of these records to the committee, so that --

9 ASSEMBLYMAN BERMAN: The production is part of what
10 was requested.

11 MR. TAGGART: No sir, it was not. If you will review
12 the subpoena you will state that it was not.

13 ASSEMBLYMAN BERMAN: The committee, by us --

14 MR. TAGGART: You mean orally this morning?

15 ASSEMBLYMAN BERMAN: Yes, sir.

16 MR. TAGGART: That, of course, does not go to the
17 subpoena. That goes to the order of the committee.

18 ASSEMBLYMAN BERMAN: The fact is that you could have
19 litigated this issue of privilege in additional forms.

20 MR. TAGGART: It is my understanding of the law that
21 the only course of action which would be open to me as an
22 attorney for my client at this juncture would have been
23 to refuse to turn over the papers and the only course of
24 action available to the committee under those circumstances
25 would be to petition the Superior Court in the event the
26 legislature is not in session to hold me in contempt.

27 ASSEMBLYMAN BERMAN: You could have resisted that
28 petition and asserted that as your ground for refusal.

1 MR. TAGGART: Well, Mr. Berman, make no mistake. I
2 am not voluntarily turning over those papers.

3 ASSEMBLYMAN BERMAN: I understand that.

4 MR. TAGGART: All right.

5 ASSEMBLYMAN BERMAN: There was no condition or require-
6 ment in terms of this confidentiality, however.

7 MR. TAGGART: I don't understand that statement.

8 MR. BURKETT: No. No.

9 ASSEMBLYMAN BERMAN: The issue of your request, after
10 the fact, that we keep this matter confidential is just that,
11 your request.

12 MR. TAGGART: That's correct. I don't believe there
13 is any legal barrier presented to the committee. I presume
14 they can have this whole matter tried in the papers if
15 they wish to do so.

16 CHAIRMAN PAPAN: Mr. Taggart, I want you to understand
17 that these papers are going to be examined by this committee,
18 and that these papers on examination will probably contribute
19 to the report that this committee will issue.

20 MR. TAGGART: That is one man's opinion. That is
21 not a question. That is a statement.

22 CHAIRMAN PAPAN: Right. I want you to understand to
23 what use these papers will be put.

24 MR. TAGGART: What use will they be put to, sir?

25 CHAIRMAN PAPAN: As part of the report that will be
26 issued.

27 MR. TAGGART: I reiterate my request, and it is
28 a request, that the committee will recognize the .

1 confidentiality and respect it.

2 CHAIRMAN PAPAN: Now, are there any other questions of
3 these two witnesses?

4 [No response.]

5 CHAIRMAN PAPAN: There is a question that I do have.

6 Mr. Burkett, at one point Mr. Anderson was contacted
7 by the Examiner newspaper, and our understanding was that
8 the specific question was asked about the availability of
9 this report. My understanding is that you denied the
10 existence of this report.

11 Could you shed some light on it, sir?

12 MR. BURKETT: I never denied the existence of those
13 work papers which you have in your hand. All I might suggest
14 -- and, here, I was not a party to that conversation, but I
15 submit there is a definite difference between a report,
16 which, necessarily, has conclusions in it and text in it
17 and 13 working papers which have no prose on them at all.

18 MR. TAGGART: Mr. Papan, I might point out that Mr.
19 Anderson is present today --

20 CHAIRMAN PAPAN: I intend to call him.

21 MR. TAGGART: -- and is available to testify on that
22 point.

23 CHAIRMAN PAPAN: That's fine. I think, if there are
24 no other questions from any of the members, then, we will
25 proceed with the testimony from, I think, in this instance,
26 Mr. Jaekle is the one I'd like to call.

27 If you could stay available I'd most appreciate it.
28 You might be able to shed some more light.

1 Thank you.

2 MR. TAGGART: We wouldn't think of leaving.

3 CHAIRMAN PAPAN: I'd like, sir, at this time to put
4 you under oath.

5 - - -

6 W. M. JAEKLE,
7 having been first duly sworn, testified as follows:

8 CHAIRMAN PAPAN: I would also like to state that this
9 committee is most appreciative of the fact that your
10 vacation was interrupted in order that you appear as a witness
11 at these proceedings.

12 Do you have a statement, sir, that you want to make?

13 MR. JAEKLE: No sir, I do not.

14 CHAIRMAN PAPAN: During the time we conducted the
15 hearings in Burlingame specific questions regarding knowledge
16 of what the impact of a fare increase of 111 percent would be
17 on patronage and whether your company, that is, Southern
18 Pacific Transportation Company, was making this kind of a
19 study, your answer, Mr. Jaekle, as I recall was no to the
20 question and no to having any knowledge of a study or the
21 impact of a 111 percent increase on patronage.

22 MR. TAGGART: Mr. Papan, excuse me for the interruption --

23 CHAIRMAN PAPAN: Yes.

24 MR. TAGGART: -- I was advised by Mr. Donald C. Fields,
25 your administrative assistant, that I would be provided with
26 a final, if you will, transcript of the proceedings of
27 September 19 prior to this meeting today. I have not yet
28 been provided with a final transcript. I was provided last

1 Friday night at 5:00 o'clock in Sacramento, some six weeks
2 after the hearing, with what was referred to me as a rough
3 draft of the transcript. Is that the document that you may
4 be referring to?

5 CHAIRMAN PAPAN: Please forgive me, Mr. Taggart. Would
6 you kindly run that by me again?

7 MR. TAGGART: All right. I was provided on October
8 25 through our office in Sacramento a copy of what was
9 referred to by Mr. Fields as a rough draft of the transcript.
10 I was further advised that Mr. Fields was editing and
11 reviewing that transcript and that we would be provided with
12 the final copy, he so states in the letter here, prior to
13 the hearing on October 31.

14 My only question is, are we both speaking from the
15 same document?

16 CHAIRMAN PAPAN: Maybe Mr. Fields should throw some
17 light on this.

18 MR. TAGGART: A "yes" or "no" is all I need.

19 MR. FIELDS: And the letter to Mr. Miller I am not
20 sure I used the term "editing" or not. I was listening to
21 the belts to make sure we had an accurate record.

22 Yes, the draft that you have is the same as the
23 committee's with the exception that on the Alquist exchange
24 the word "however" doesn't appear on Mr. Jaekle's testimony
25 as I was listening to it on the tape. So that if you look
26 at --

27 MR. TAGGART: That's fine, Mr. Fields.

28 MR. FIELDS: That's the only difference.

1 MR. TAGGART: Your letter states, "I am providing you
2 with a copy of our rough draft of the testimony."

3 MR. FIELDS: As a courtesy to you, Mr. Taggart, after
4 being requested sometime to check your testimony that you
5 gave us the 19th and 20th, I provided you with the same
6 information that the members of this committee have.

7 MR. TAGGART: That's all I wanted to know. I just
8 wanted to make sure we are talking from the same document.

9 MR. FIELDS: That is exactly it.

10 CHAIRMAN PAPAN: I had asked Mr. Jaekle a question.

11 And might you throw some light on --

12 MR. JAEKLE: Could you repeat the question, sir, please?

13 CHAIRMAN PAPAN: Yes. At the time that you testified
14 in Burlingame you were asked whether Southern Pacific had
15 conducted any kind of a study to determine the impact of a
16 111 percent increase on the patronage.

17 I might read from the record, if you'd like, and in that
18 way you could answer according to what you . . .

19 It says, "On occasion fare increases have caused the
20 reduction of patronage which ultimately resulted in your
21 asking for reduced service."

22 Mr. Jaekle: Answering: "That is not fair to say
23 (inaudible). No. We have a choice of one or the other
24 (inaudible). What I am saying is that we can go to a higher
25 level of rates and (inaudible) this will tend to offset our
26 losses.

27 "Chairman: If we -- and I would like, possibly, that
28 what your studies might indicate, or if the studies have been

1 been conducted what the impact of a 111 percent rate increase
2 would do to patronage. Do we have information that the
3 railroad has compiled as to what the rate increase will do?

4 "MR. JAEKLE: No. (Inaudible) Slipped over that
5 rather quickly. We have not -- we intend to look into that,
6 but we have not done it."

7 MR. JAEKLE: Is that the question, sir?

8 CHAIRMAN PAPAN: I could continue reading, and you might
9 like --

10 MR. JAEKLE: No, sir. I am with you.

11 CHAIRMAN PAPAN: Okay.

12 MR. JAEKLE: I think that is fairly representative of
13 what I said in the statement there on September 19.

14 To the best of my knowledge, on September 19 I did
15 not know that any study as such had been made. In fact, it
16 was not until Mr. Burkett called me on Sunday morning,
17 May 13 -- that was 24 days after -- pardon me. October 13.
18 It was 24 days after the hearing that you held in Burlingame
19 that I heard of the Banks report. And that was the first
20 time I had ever heard of it. So what I said there was true,
21 to the best of my knowledge at that time.

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1 THURSDAY, OCTOBER 31, 1974

2:30 O'CLOCK P.M.

2 - - -

3 CHAIRMAN PAPAN: Mr. Jaekle, are you often a party,
4 as part of the Southern Pacific structure, involved in fare
5 increases and discontinuances of services?

6 MR. JAEKLE: No, sir.

7 CHAIRMAN PAPAN: You are not? On any occasion involved
8 in that area?

9 What is your capacity with Southern Pacific, if I may
10 ask?

11 MR. JAEKLE: Vice President of Engineering and Research,
12 not Vice President of Transportation but Vice President of
13 Engineering and Research. I am in the Operating Department.

14 I don't have anything to do with the passenger business
15 as such except from the operations side of it.

16 CHAIRMAN PAPAN: Who, might I ask, directed you to appear
17 on behalf of Southern Pacific to these hearings knowing that
18 a letter was sent out expressing the concerns of the committee
19 and what they will be looking into during those hearings?

20 How was it that you were selected to appear as one of
21 the witnesses?

22 MR. JAEKLE: Well, I returned from Houston, as I recall,
23 about two or three days before the hearing, and Mr. Burkett
24 suggested I personally appear and showed me --

25 CHAIRMAN PAPAN: Was this --

26 MR. JAEKLE: My answer is Mr. Burkett.

27 CHAIRMAN PAPAN: Did you consider this unusual, that
28 you should have been the person representing Southern Pacific

1 at these hearings?

2 MR. JAEKLE: No.

3 CHAIRMAN PAPAN: What was your understanding at that
4 time as to what you were attending the hearings -- did you
5 have available to you the letter that was sent to Mr. Burkett
6 in the areas of concern that we have?

7 MR. JAEKLE: Yes, I did.

8 CHAIRMAN PAPAN: And I am making specific reference to
9 the letter that was initially sent out at your request to give
10 you some idea as to the area that the committee was going to
11 concern itself about, and that letter was sent out over the
12 signature of Mr. Fields and dated September 18th on stationery
13 that my office uses.

14 MR. JAEKLE: That is a statement --

15 CHAIRMAN PAPAN: Yes.

16 Were you apprised of the contents of this letter?

17 MR. JAEKLE: Either that or a letter that came the
18 following day, I believe, and revised.

19 In fact, I think I just saw the revised version. Maybe
20 I can help.

21 At the time I had my --

22 MR. TAGGART: This is something to help refresh your
23 recollection.

24 CHAIRMAN PAPAN: That was the only letter, Mr. Jaekle,
25 that we did send out.

26 MR. JAEKLE: Well, I had some notes written up in trying
27 to prepare myself in testimony before your committee, Mr.
28 Papan. Just a second here.

1 Yes, sir, this is the letter of September 18th to Mr.
2 Burkett and signed by Mr. Fields.

3 CHAIRMAN PAPAN: And you went to Mr. Burkett's office.
4 Could you give us the particulars on how he asked you to at-
5 tend those hearings?

6 Did he give you the letter and say, "Here's what they are
7 going to be asking about"?

8 MR. JAEKLE: He said, "Here's the information that Mr.
9 Papan's assistant has furnished us. And what are your answers
10 to these?"

11 And I went through it with Mr. Taggart and Mr. Burkett.

12 CHAIRMAN PAPAN: And you felt that you were qualified
13 to answer the questions?

14 MR. JAEKLE: Yes, sir.

15 MR. TAGGART: Mr. Papan, perhaps I can shed some light
16 on this.

17 CHAIRMAN PAPAN: Please.

18 MR. TAGGART: I was present when Mr. Jaekle was in Mr.
19 Burkett's office. The questions referred to in Mr. Fields'
20 letter covered, as you know, a very wide spectrum of questions
21 that the committee was going to be considering, extremely
22 wide.

23 And it was felt, and a determination was made by Mr.
24 Burkett and myself that the best witness to testify would be
25 a witness with the best overall and general knowledge of the
26 subject matter.

27 And that is the reason that Mr. Jaekle was requested to
28 present the testimony on behalf of Southern Pacific Company,

1 because we felt that his background was such that he has the
2 best general knowledge and so would be best able to comment
3 upon the wide spectrum of questions which were posed in your
4 letter.

5 And I did go over the questions with Mr. Jaekle prior to
6 his appearance.

7 MR. BURKETT: I want to supplement one thing here which
8 might help to understand what happened, and that is I had
9 a telephone conversation with Mr. Fields. I think he was in
10 your Sacramento office.

11 And at that time we discussed the matter, and I said I
12 was interested in getting the Southern Pacific officer who
13 was most familiar with the entire spectrum.

14 And I said, "Of course, we don't want to have a parade of
15 witnesses. We will try to get one witness."

16 And Mr. Fields told me at that time that he concurred
17 that we should only have one witness.

18 Now, it is significant to me that after Mr. Jaekle had
19 testified, that there was a request for one other witness,
20 and that was Mr. Lundeen, who did appear on the second day
21 of hearing in Burlingame with respect to costs.

22 And I said that Mr. -- the examination of Mr. Jaekle,
23 I believe, indicated that that was the one area where the
24 subcommittee felt that he was not giving it the information
25 it needed.

26 I would also want to call attention specifically to the
27 fact that Mr. Jaekle was previously the Chief Engineer of
28 Southern Pacific Transportation Company, previously a General

1 Manager of Southern Pacific Transportation Company, and many
2 of these areas are completely outside the pending proceeding
3 before the California Public Utilities Commission but are,
4 rather, directed at such questions as building a railroad
5 line to the airport, to moving the 3rd and Townsend Street
6 Station to another location, to using the San Bruno Branch
7 for passenger service.

8 There are many other areas there where I knew from my
9 own dealings with Mr. Jaekle over the years that his experi-
10 ence qualified him to answer those questions.

11 CHAIRMAN PAPAN: Since the three gentlemen are present,
12 where did we get the breakdown on communications, when Mr.
13 Jaekle was sent to testify, that no mention was made -- since
14 you were present, Mr. Taggart, why wasn't Mr. Jaekle apprised
15 of the fact that this was an area of concern? Why didn't
16 somebody come forth at that time and state, "Yes," correct
17 Mr. Jaekle right there during the time of testimony to indi-
18 cate that there was a report and we had commissioned somebody?
19 Am I to understand, Mr. Taggart, that you weren't privileged --

20 MR. BURKETT: Let me answer that very specifically, be-
21 cause I have the personal responsibility for this.

22 There was no study which had ever been completed. There
23 was no report which had ever been completed.

24 These I regarded as my work sheets and that I did not
25 intend to voluntarily make public this material which I
26 considered highly privileged.

27 And so I will take the responsibility of saying that I
28 had no intention of giving it to Mr. Jaekle or any other

1 witness who might testify.

2 And that is for three different reasons: First reason
3 is, as I have indicated, there was no completed study, only
4 work sheets which you have in front of you.

5 Secondly, they were part of my work product.

6 And, thirdly, and most importantly, this whole thing --
7 all of those work sheets are directed at one thing alone, and
8 that is the impact and gross revenues.

9 And I felt that that was something which was within my
10 private papers, and I never thought that I was going to have
11 to make them public.

12 CHAIRMAN PAPAN: Let me ask you a question: In view,
13 Mr. Burkett, of the fact that you have had seven raises since
14 1967 totalling somewhere in the neighborhood of sixty-three
15 percent, has there been any other previous occasion where
16 this kind of study was conducted reflecting on gross receipts
17 which ultimate reflect on the patronage?

18 MR. BURKETT: Well, it is difficult for me to answer that
19 question. I can say probably.

20 Let me answer it this way: I think all of those in-
21 creases to which you have referred did not exceed five or ten
22 percent.

23 In all of those cases the uncontradicted testimony pre-
24 sented was that a fare increase of five percent or ten per-
25 cent did not have any substantial effect on patronage.

26 And so since we had that testimony, since it always was
27 accepted, since it is my recollection that the staff of the
28 Commission accepted it, there was no reason in those other

1 cases where we are seeking only five or ten percent to make
2 such a study.

3 CHAIRMAN PAPAN: Are there any questions by any of the
4 members?

5 Mr. Burkett, it is rather unfortunate that since that
6 letter was sent out on the 18th, that Mr. Jaekle was not
7 apprised of this study and the commissioning of R. L. Banks
8 to do the study.

9 MR. BURKETT: Is that a question, sir?

10 CHAIRMAN PAPAN: No. I am expressing the regrets that
11 developed as a result of a member of Southern Pacific, who
12 is very much part of the executive management division, that
13 he was unaware of this study.

14 I have serious reservations, however, that within the
15 committee hearing room there were members or people present
16 that could have shed some light on it knowing that Mr. Jaekle
17 could have possibly stated that he personally had no informa-
18 tion, but that possibly a report of this kind might be in
19 the making or a firm was commissioned to do that, and probably
20 it would have evolved in somewhat a different fashion than
21 what presently has occurred.

22 If there are no additional questions from the members,
23 I would entertain any kind of statement from either of the
24 three gentlemen present that would help set the record
25 straight and shed any further light on our concern, and that
26 concern being the impact that your operation will have on the
27 planning of a transportation system for San Mateo County that
28 extends as far south as Santa Clara.

1 Our concerns are that your corporate responsibility at
2 this point, I feel -- and I don't want to make it sound like
3 a lecture -- should be one of assisting those in public ser-
4 vice with the plans that presently are being considered and
5 with transportation in general as we go down the line.

6 MR. BURKETT: I will make a comment.

7 CHAIRMAN PAPAN: Sure.

8 MR. BURKETT: The first has to do with certain references
9 which you made to the fact that this was a study and this was
10 a report.

11 I say that anyone who looks at the thirteen work sheets
12 in front of you would not conclude that those thirteen work
13 sheets constitute either a study or a report.

14 Secondly, as far as my obligations as an attorney are
15 concerned, I have never made it a practice in preparing for
16 litigation, whether it is in the courts or the California
17 Public Utilities Commission, to do anything more than is
18 required of any lawyer, and that is to try to prepare and
19 present the best possible case and to do so. I have found,
20 from long experience, that it is a mistake to make public
21 all of the material which might be developed and never used.

22 Now, as far as the last part of your question is con-
23 cerned, we do have, and I think the committee has a copy of
24 the M.T.C. report, and I think that report accurately and
25 properly sets forth the position of Southern Pacific Transpor-
26 tation Company and indicates the cooperation we have extended,
27 which we did extend in the preparation of that report and
28 which we will continue to extend.

1 And so there can be no question about it, I will say that
2 I concur completely in the statements made concerning the
3 position of Southern Pacific as stated in the M.T.C. report.

4 And I think it might be helpful for the record if I
5 read from Page 38 of that report. That is not our report.

6 CHAIRMAN PAPAN: Could you hold it for one question from
7 Mr. Berman? And then I will let you go ahead.

8 ASSEMBLYMAN BERMAN: That is all right.

9 CHAIRMAN PAPAN: Fine.

10 MR. BURKETT: And I think this report -- which has been
11 publicized -- is one sheet and contains the Southern Pacific
12 position. This is Section 3.41, Page 38:

13 "The potential rail service is owned and
14 operated by Southern Pacific Transporta-
15 tion. The company's position is vital to
16 any future plans.

17 "As stated below, SP wishes to continue to
18 operate passenger service between San
19 Francisco and San Jose only if it can be
20 done without incurring a loss.

21 "Southern Pacific will invest additional
22 capital in the Peninsula passenger service
23 only if it results in placing the opera-
24 tion on a nonloss basis.

25 "Next, Southern Pacific will not accept
26 a direct subsidy for the Peninsula pas-
27 senger service, since such acceptance
28 usually involves loss of control of the

1 railroad's own operation.

2 "Finally, Southern Pacific will protect the
3 interests of its Peninsula freight customers.
4 It cannot provide appreciably improved pas-
5 senger service over present facilities with-
6 out jeopardizing those interests."

7 CHAIRMAN PAPAN: Mr. Berman?

8 MR. TAGGART: You understand, Mr. Papan, that Mr. Burkett
9 was reading from the M.T.C. report? This is not our report.
10 This is the M.T.C. report.

11 CHAIRMAN PAPAN: Yes.

12 ASSEMBLYMAN BERMAN: Mr. Chairman, it seems -- and I
13 haven't been familiar with this before coming here today,
14 with this issue -- that part of the problem of this whole
15 question is what you call work sheets, and I am not sure
16 what the definition of work sheets is, versus the study.

17 I am sure that Southern Pacific has a the raw material
18 that it needed to make a determination with respect to what
19 rate increases it felt it needed.

20 Somewhere along the line you made a decision to go out-
21 side your company to have some of that data analyzed to sup-
22 port that application; is that a fair statement of what --

23 MR. BURKETT: No, that is not a fair statement. The
24 material which we had to make the application for 111 percent
25 was generated within our company.

26 We did not know what the 1974 costs were.

27 On the basis of those costs we needed 111 percent in-
28 crease, and that is the basis for the 111 percent and nothing

1 else.

2 ASSEMBLYMAN BERMAN: What was the basis of going to Mr.
3 Banks?

4 MR. BURKETT: The basis of going to Mr. Banks was that
5 I felt that I should be prepared, because at that time in
6 May I did not know what percentage we were going for, but
7 at that time I felt that we would be going for a substantial
8 increase and that I should be prepared to show that the in-
9 crease that we were seeking would improve our revenues.

10 When I made that decision in May, I went to Mr. Banks
11 thinking the easiest way to do it would be to have him de-
12 termine the effect of fare increases on gross revenues.

13 I was reasonably sure at that time in May that the point
14 he would come up with would be a higher point than the X
15 percent we were seeking.

16 In July I saw that that was not true, because I knew
17 the point he had come up with, as indicated on the work sheets,
18 was lower than the percentage we would have to go for.

19 And it then became all too clear that we were going to
20 have to do the extra work of not going on a gross revenue
21 basis but going on a net revenue basis.

22 And in order to go on a net revenue basis we would have
23 to make a study, which we have not yet done, of determining
24 what expenses would be saved if any patronage fell off.

25 ASSEMBLYMAN BERMAN: I mean it seems a little bit like we
26 are involved in a semantic kind of dispute.

27 MR. BURKETT: No, not at all. It's very clear --

28 ASSEMBLYMAN BERMAN: It sounds to me like you go to

1 an outside consultant --

2 MR. BURKETT: No, I went to the outside -- now, let me
3 see if I can simplify it.

4 I knew I was going to file an application with the
5 California Public Utilities Commission for X percent.

6 I didn't know what percent it was. I knew that it was
7 going to be a substantial amount.

8 I knew that I was going to have to show the effect of
9 that increase on our revenues to show that it would not be
10 self-defeating, that we would maximize our revenues.

11 I knew that as long as I could show that the point of
12 maximization of gross revenues was greater than the X percent
13 we were going for, that that would be an easy, clear presenta-
14 tion to make and one that I would probably use.

15 I hadn't determined yet, but I --

16 ASSEMBLYMAN BERMAN: I just want to make sure I under-
17 stand what you said up to this point.

18 You are going to him thinking that the rate increase,
19 if granted, would produce greater revenues, gross revenues,
20 taking into consideration -- well, gross -- a higher level
21 of revenues by virtue of getting that rate increase than you
22 would receive if you did not increase --

23 MR. BURKETT: No, sir.

24 Maybe if I gave you specific figures -- and these are
25 purely hypothetical figures for purposes of illustration --
26 you would understand.

27 Let us assume that I thought I would have to go for a
28 seventy-five percent fare increase in order to make myself

1 whole. I was hoping that if I went to Mr. Banks, and he came
2 back and he said, "Well, you would maximize your gross revenues,
3 not your net revenues, at eighty percent, eight-five or nine-
4 ty percent," that then I would have a clear-cut easy case,
5 and I could dispense with the necessity of doing anything more.

6 And, of course, there in that hypothetical situation my
7 application would have been for seventy-five percent.

8 I wouldn't have gone for eighty or eighty-five percent.
9 I would go for the amount necessary to make myself whole. But
10 I would want to know that the point of maximizing gross
11 revenues was greater than seventy-five percent.

12 That was my frame of mind as an attorney in May when I
13 asked Mr. Banks to make this gross revenue study.

14 ASSEMBLYMAN BERMAN: Why do you always say, "as an at-
15 torney"? Why not "as Southern Pacific" --

16 MR. BURKETT: Because this was not a decision of Southern
17 Pacific.

18 This was my decision as a lawyer.

19 I was trying to prepare a case for presentation to the
20 California Public Utilities Commission.

21 I was concerned --

22 ASSEMBLYMAN BERMAN: But why --

23 MR. BURKETT: May I finish, please?

24 I was concerned with performing my duty as a lawyer, and
25 I think my duty as a lawyer is to marshal all the evidence I
26 can, which is proper and legitimate, to sustain the burden
27 of proof which is placed upon me by the California Public
28 Utilities Code and the California Constitution.

1 ASSEMBLYMAN BERMAN: To justify a rate increase that
2 Southern Pacific seeks.

3 MR. BURKETT: No, sir, to justify -- in this particular
4 instance, my particular object was to justify an increase
5 which would cover our costs and nothing more.

6 ASSEMBLYMAN BERMAN: "Our" being Southern Pacific?

7 MR. BURKETT: Well, now, we are playing with words.
8 Although I am not in private practice, I regard the Southern
9 Pacific as my client, just as if I were in private practice.

10 ASSEMBLYMAN BERMAN: I still don't understand why you
11 went to a consultant.

12 Wasn't it a study and report on what would be the
13 maximization of your gross revenues for a particular rate
14 increase? That seems to me just what you sought.

15 MR. BURKETT: You are correct, I did.

16 ASSEMBLYMAN BERMAN: So all this stuff about work sheets,
17 it's work sheets, it's not a study, I don't understand that.

18 MR. BURKETT: I think you don't understand it because,
19 I think, as you know, whether it is an architectural study or
20 an appraisal study or a medical study, you don't have a study
21 completed until you have an expert who comes forth with
22 specific sentences, specific language, and says this or that.

23 ASSEMBLYMAN BERMAN: Now, it would be your contention
24 that, in fact, if you had gone outside the company for some
25 study which said that the worst thing you could do in terms
26 of maximizing gross revenues is to seek a rate increase be-
27 cause of the affect on patronage, or whatever, since that
28 was solicited by you as the attorney, that should be irrelevant

1 and immune from any review by the agency that would actually --

2 MR. BURKETT: No, sir.

3 ASSEMBLYMAN BERMAN: -- determine whether or not to give
4 you the rate increase?

5 MR. BURKETT: No, sir, you don't understand me, and I
6 am awfully sorry. You don't understand me.

7 I was hoping and expecting that the maximization of gross
8 revenue would be greater, that is, greater than my hypothetical
9 seventy-five percent; that it would be eighty or eighty-five
10 percent. That is what I was hoping.

11 If it had come up, as you suggest, as being zero percent,
12 then all the more reason I would have had to go the net reve-
13 nue route.

14 I know that in the last analysis, although the gross
15 revenue route is a convenient shortcut, it saves a tremendous
16 amount of time and effort.

17 And, incidentally, the reason why I could go to Mr.
18 Banks for a gross revenue study is that he could make the
19 gross revenue study, but when it comes to the net revenue
20 study, that is a study which necessarily involves a careful
21 review on the San Francisco Peninsula of our passenger train
22 operations, consideration of what patronage might be lost,
23 whether we can take a car off of one train or two cars off
24 another train, whether we can save a helper conductor, whether
25 we can save fuel, whether we can -- any other savings we
26 could make.

27 And when I said it was not practical for Mr. Banks in
28 my opening statement to make the expense study, that was the

1 reason for that.

2 ASSEMBLYMAN BERMAN: It was practical to make the gross
3 revenue study?

4 MR. BURKETT: Yes, but not -- it was practical, as you
5 can see from the work sheets.

6 It is practical for him to make a gross revenue study.

7 It is not practical for him to make a net revenue study.

8 ASSEMBLYMAN BERMAN: And we now have the gross revenue
9 study?

10 MR. BURKETT: You do not have the study. You have thir-
11 teen work sheets which set forth certain columns and certain
12 graphs, and I submit that the thirteen sheets which you have
13 do not constitute a study and do not constitute a report.

14 There were thirteen work sheets which were handed to
15 me, and when I received them, I told Mr. Banks to hold the
16 study in abeyance.

17 CHAIRMAN PAPAN: Why?

18 MR. BURKETT: Until he furnished me further --

19 CHAIRMAN PAPAN: Why?

20 MR. BURKETT: Because I knew it was necessary at that
21 time, in order to do that, to make the expense study, and,
22 as I have tried to say this morning, in order to know where
23 we are going to save expenses, we have to know where you are
24 going to lose patronage.

25 If you are going to lose patronage between San Francisco
26 and San Bruno, you are going to have one savings.

27 If you are going to lose patronage between San Jose and
28 San Mateo, you are going to have an entirely different sav-

1 ings.

2 It is impossible for most work sheets to determine whether
3 the gross revenues which might be lost would be lost between
4 -- according to my example -- between San Francisco and San
5 Bruno or between Burlingame and San Jose.

6 And before this is over, in order to make an appropriate
7 net revenue study, those factors will have to necessarily be
8 determined.

9 CHAIRMAN PAPAN: Are you through, Mr. Berman?

10 Has it ever entered your thinking that fare increases
11 don't always mean a reduction or no deficits at all?

12 MR. BURKETT: Oh, yes.

13 CHAIRMAN PAPAN: When did you arrive at that kind of
14 thinking?

15 MR. BURKETT: I think I -- Mr. Ben Heineman of the Chi-
16 cago-Northwestern in the 1950's frequently issued news
17 releases that he had been able to put his commutation service
18 out of Chicago on the basis where the Chicago-Northwestern
19 was making a profit out of it.

20 And I think Mr. Heineman is a very able railroad execu-
21 tive, and I accept his statement.

22 CHAIRMAN PAPAN: What is the net effect, do you have
23 any idea of the net effect since 1967 on passenger numbers
24 utilizing that commuter service?

25 MR. BURKETT: No, I don't have it.

26 CHAIRMAN PAPAN: Anyway, now, let me ask you, am I to
27 understand, going at it by another avenue, that you did not
28 make a conscious effort to withhold this report from Mr.

1 Jaekle?

2 MR. BURKETT: No, sir, I made no conscious effort .

3 CHAIRMAN PAPAN: Assemblyman Arnett proceeded in a line
4 of questioning, and I think it is only proper that I read a
5 press release so that all of us can get the benefit of it,
6 a press release from Southern Pacific dated 904 Pacific
7 Standard Time, San Francisco, Southern Pacific Company,
8 Thursday, October 31st:

9 "Reported the third quarter net income of
10 \$35,651,000 for a dollar thirty-four a
11 share up fifty-eight percent. \$22,548,000,
12 or eighty-five cents a share for the same
13 quarter in 1973.

14 "Total operating revenues increased from
15 \$387.6 million to \$446.7 million.

16 "Southern Pacific's net income for the
17 first nine months of 1974 was \$85,069,000
18 or three twenty a share, up forty percent
19 from the 60,956 or \$2.29 a share for the
20 same period last year.

21 "Operating revenues for the first nine months
22 increased from 1.143 billion last year to 1.280
23 billion this year.

24 "Gains in operating revenues came principally
25 from increases in railroad freight rates.

26 Southern Pacific's President Benjamin F.
27 Biagini said, 'With better traffic re-
28 sults noted, particularly from chemicals,

1 canned goods, paper and pulp, coke, scrap
2 metal and other waste materials and crude
3 petroleum which Southern Pacific is handling
4 this year in unit trains.'

5 "Partially offsetting these gains were traffic
6 declines in forest products and other building
7 materials, automobiles and auto parts and
8 copper.

9 "Major strikes in the copper industry in July
10 and August curtailed shipments of copper and
11 finished products, but SP reported this
12 traffic as moving again in good volume.

13 "With the absence of any rebound in our
14 forest product and automobiles, business
15 continues to be disappointing.

16 "Biagini said, 'But railroad traffic re-
17 flects national business patterns, and we
18 have been experiencing a definite softening
19 of the economy this fall. Lumber traffic
20 has been weakening all year with a drop in
21 the housing construction industry and Southern
22 Pacific's loading of forest products,'"

23 And I don't make out the rest of it.

24 But I read that because of your answer to Assemblyman
25 Arnett, Mr. Burkett, indicating your concern about the
26 perishables and raising the rates affecting the transporting
27 of perishables on your lines. Do you remember that testi-
28 mony?

1 MR. BURKETT: Yes, I remember it very well, and I think
2 it is completely consistent with what you have just expressed.

3 CHAIRMAN PAPAN: Can you run that by me, sir.

4 MR. BURKETT: Yes, sir.

5 A railroad is like any large department store. We have
6 a number of different items.

7 We have an obligation -- items that we can charge rates
8 on or first which are exempt from regulation.

9 We have various areas, and one of them I mentioned
10 this morning, where it is not Southern Pacific alone, but it
11 is Southern Pacific and all of the railroads of the United
12 States which are requesting a hundred and five percent in-
13 crease in the rates on grapes and deciduous traffic. It
14 referred to deciduous fruit before. We are all vigilant to
15 see that each portion of traffic, whether it be the agricultural
16 products or whether it be the Peninsula service, is at least
17 contributing to its cost.

18 And as far as our overall earnings are concerned, I
19 think that the statement which you have read is completely
20 accurate.

21 CHAIRMAN PAPAN: Thank you, Mr. Burkett.

22 Thank you, gentlemen and --

23 MR. TAGGART: Mr. Papan, I would like to make just one
24 short comment, if I can.

25 CHAIRMAN PAPAN: Sure.

26 MR. TAGGART: And it perhaps follows what Mr. Burkett
27 has said. Is it fair that the customers of the Southern
28 Pacific Company, which range through twelve states, approxi-

1 mately, should bear the cost of transporting 10,000 commuters
2 a day up and down the San Francisco Peninsula because there
3 is no bag of gold that you can dip into to make up this loss
4 of over four and a half million dollars a year?

5 So is it fair that a lumber shipper in Oregon, that a
6 produce shipper in the Salinas Valley, that the customers,
7 ultimate customers of these products will be in effect putting
8 up half the price of a commuting ticket for 10,000 commute
9 travelers to go up and down the Peninsula?

10 That is why I submit, sir, that your statement pertaining
11 to our earnings has really no relevance to this particular
12 case.

13 CHAIRMAN PAPAN: I will stipulate to that.

14 However, it was discussed by Assemblyman Arnett and Mr.
15 Burkett, and since it was provided, I felt that at this point,
16 since Mr. Burkett has seen fit to reflect on freight rates
17 affecting that as going up a hundred and five percent, I
18 think in view of the present operation and the success of that
19 operation, asking for a hundred and five percent causes some
20 confusion, some of which you have seen fit to answer to.

21 MR. TAGGART: Well, how much of the hundred and five
22 percent is attributable to the loss of taking commuters up
23 and down the Peninsula?

24 You see, this can go on and on, but I think you can un-
25 derstand my point.

26 ASSEMBLYMAN BERMAN: There is another question we can
27 ask: Is it fair that Southern Pacific, under the claim that
28 would increase its rates 111 percent so that commuter service

1 can bear its share --

2 MR. TAGGART: That is a break-even point, you understand.
3 That is without rate of return on the investment.

4 ASSEMBLYMAN BERMAN: Is it fair for Southern Pacific,
5 in order to get a fare increase to accomplish that stated
6 goal, would then try to shield itself and to protect any
7 material which might cause or compel a different conclusion
8 with respect to achieving that goal?

9 MR. BURKETT: Well, now, I want to deny that those
10 conclusions in those thirteen work sheets that you have in
11 front of you in any way take away from my 111 percent.

12 And, as I said in my sworn testimony, it was my opinion
13 when I filed the application, and it is my opinion now, that
14 the 111 percent is justified.

15 I, of course, knew about the work sheets when I filed
16 the application, but I say there is nothing in those work
17 sheets which detracts from that.

18 The next question you might ask, in those circumstances
19 why have we objected to producing them.

20 And the answer is that in my practice as an attorney,
21 I just resent having my private papers made public when I
22 have hired an expert to make certain studies which I might
23 or might not use.

24 MR. TAGGART: You would be hard pressed to find any
25 attorney in this state who would feel differently, Mr. Berman.
26 I think you will agree with that. Assuming you have acquired --

27 CHAIRMAN PAPAN: We will move on, gentlemen.

28 Thank you for the testimony.

NOTE: NEXT PAGE IS 108

1 Thank you, Mr. Jaekle, for giving up your time, sir.

2 MR. JAEKEL: I will tell my wife what you said.

3 CHAIRMAN PAPAN: If she has any question, tell her to
4 see Mr. Burkett.

5 Thank you.

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1 ANDY ANDERSON,

2 having been first duly sworn, testified as follows:

3 CHAIRMAN PAPAN: I will read you the question as it was
4 formulated, Mr. Anderson, and maybe you can throw some light
5 on it.

6 MR. ANDERSON: Yes, sir.

7 CHAIRMAN PAPAN: It is the committee's understanding
8 that when the reporter from the Examiner first called you
9 about the existence of the so-called "Banks study," is it
10 correct that you denied its existence after checking with
11 Mr. Burkett, then later after having assured the reporter
12 that you had no information as to its existence you finally
13 admitted its existence?

14 MR. ANDERSON: No sir, that is not correct.

15 CHAIRMAN PAPAN: Could you throw some light on that?

16 MR. ANDERSON: Yes, sir. If I could just back up a
17 little bit on that, the reporter from the Examiner on the
18 date of the pre-hearing conference here before the
19 California Public Utilities Commission, which I believe was
20 October 9, talked to one of the people in my office who was
21 there and asked if he could get a copy of the Banks study.
22 The gentleman in my office, Mr. Phelps, told me about this
23 later in the day, that he had requested it. Mr. Phelps had
24 said he didn't know anything about it and that he understood
25 that Mr. Kramer from the Examiner would be in contact with
26 us to obtain a copy. The next morning, October 10, late in
27 the morning Mr. Kramer called me and asked me, as well as
28 I can recall, he asked, "Can I get a copy of the Banks

1 report?"

2 I, having been prewarned that the question was there,
3 I had checked earlier with Mr. Burkett, and my reply to Mr.
4 Kramer then was that, "We do not have any copies of such
5 reports."

6 He then said, "Are you telling me --"

7 His question immediately then was, "Are you telling
8 me there is no such study or anything like that in existence?"

9 And I said, "Well, now, this is a different question,
10 and I am not quite sure of the detail of this. Let me find
11 out and I will call you back."

12 Later in the -- I then went back and tried to check it
13 out and did. And later in the day I called Mr. Kramer back
14 and I told him that our lawyers had assigned the Banks
15 organization to do a certain preliminary study on the
16 subject and that the study was not completed and that we
17 did not have copies of a report in a form to give him.

18 And there was a little more conversation back and forth
19 on this same line, and as far as I know, there was -- no one
20 ever said that it did not exist. He asked for a copy, and
21 we did not have copies, and I don't believe we have copies
22 of a report in that kind of format today.

23 I think we have had a little problem -- and I did try
24 to, in discussing this with various press people, then,
25 with Mr. Kramer and with other people, tried to explain that
26 I think all of this has been a little bit of a semantic
27 difficulty when you talk about a study. And people seem
28 to keep thinking that the study represents something is --

1 that is all bound in blue and is 40 pages and that sort of
2 thing. And we keep getting asked that. And my confirmation
3 was a study in process which was not complete.

4 CHAIRMAN PAPAN: You're talking about semantics, but
5 when you're talking about the impact of a fare increase of
6 that size on commuter traffic, it's clear from the
7 correspondence, the communication and the exchange that that
8 was the information this committee was seeking, and not, in
9 your case, sir. I'm just stating, as we reflect on
10 semantics, that oftentimes communication can be difficult,
11 but this committee is vitally concerned about the impact of
12 that fare increase and was from the very beginning. And this
13 is only supporting what you're saying about semantics.
14 And oftentimes it does get lost. However -- how that ever
15 got lost, I can't understand, but that was the extent of the
16 question that I had for you. If you feel that it was
17 semantics that caused this kind of an answer to come out,
18 then, your testimony will so indicate, and has indicated.

19 MR. ANDERSON: I feel the semantics of the question is
20 whatever was in the reporter's mind of the study that he
21 thought existed. I don't think it was a semantic difficulty
22 in my saying that we did not have a copy and, then, telling
23 him that the process was going on. It was done the same
24 day, and I did not deny its existence.

25 CHAIRMAN PAPAN: I think it's rather fortunate that
26 we were able to establish there was this kind of study,
27 there were 13 papers that might shed some light on our
28 concerns, and I am certainly glad it did come out.

1 I have no further questions if none of the other members do.

2 Thank you, Mr. Anderson.

3 Mr. Ashford, I don't think we will be needing you any
4 longer, and you are free to leave.

5 Gentlemen, you are excused. I have no further questions.
6 Anybody?

7 [No response.]

8 CHAIRMAN PAPAN: We will call now for the witnesses from
9 the Public Utilities Commission.

10 MR. TAGGART: Are you excusing all witnesses from
11 Southern Pacific, Mr. Papan, so we can go back to work now?

12 CHAIRMAN PAPAN: Yes. Thank you for coming.

13 MR. TAGGART: Thank you very much.

14 CHAIRMAN PAPAN: Unless you want to stay and listen to
15 the testimony.

16 MR. BURKETT: I will be glad to stay, but I think it
17 appropriate that I should be behind the rail.

18 CHAIRMAN PAPAN: Mr. Donovan, Mr. Tomita and Mr.
19 Gielegghem.

20 Might I take Mr. Donovan first?

21 Is that all right?

22 Mr. Donovan, I'm going to have to put you under oath.
23 Would you, please, stand?

24 - - -

25 JOHN F. DONOVAN,

26 having been first duly sworn, testified as follows:

27 CHAIRMAN PAPAN: Mr. Donovan, this committee is
28 concerned about your activities with regard to your official

1 duties and the Southern Pacific Transportation Company's
2 request for the fare increase.

3 Could you give us information about whether you have
4 been assigned to this area and how far along the activities
5 are of the PUC?

6 MR. DONOVAN: First off, the commission does not assign
7 anything to an operating division. An application is filed
8 and the division will review the application and decide
9 whether or not it would be helpful to the commission for it
10 to participate.

11 Recently -- I can't tell you just when -- the division
12 did issue an Advice of Participation indicating they would
13 participate in the Southern Pacific case. And I believe
14 you have received a letter from President Thurger of the
15 commission indicating that the division would participate.

16 CHAIRMAN PAPAN: Mr. Donovan, do you have any shortage
17 of personnel in your division?

18 MR. DONOVAN: Yes.

19 CHAIRMAN PAPAN: To your knowledge, has any memorandum
20 or other communication been sent out to persons with Finance
21 & Accounts Division indicating they would not be involved
22 in this case?

23 MR. DONOVAN: No, sir.

24 CHAIRMAN PAPAN: Mr. Donovan, there has been a great
25 deal of confusion as to the participation of Finance &
26 Accounts in the rate application case involving Southern
27 Pacific Transportation Company's Peninsula commute operation.

28 MR. DONOVAN: I know nothing about --

1 CHAIRMAN PAPAN: Would you, please, advise the committee
2 as to what the status is regarding the participation of
3 Finance & Accounts in this rate case?

4 MR. DONOVAN: An Advice of Participation has been
5 issued. Ordinarily speaking, under the division of
6 responsibilities within the division, audit work in connec-
7 tion with rate cases is now and has been for some years
8 handled by the assistant director. The director usually
9 confines his activities to those regarding finance,
10 participates in rate-of-return studies or reviews rate-of-
11 return studies and, of course, is interested in any questions
12 as to policy or changes in policy.

13 I have not been directly involved in the Southern
14 Pacific Transportation case. Mr. Tomita has been to the
15 extent that the division has been involved at all. I could
16 not tell you whether we have done any work on it now or
17 not. I know its intended --

18 CHAIRMAN PAPAN: Thank you, Mr. Donovan.

19 Any questions of the witness?

20 Mr. Berman?

21 ASSEMBLYMAN BERMAN: Mr. Donovan, for the benefit of
22 this meeting would you give us a better understanding of
23 how the PUC and its staff works in a case like this?

24 MR. DONOVAN: I will do the very best I can. It's
25 very complex. We could spend the next week, and I don't
26 think I'd describe it one half. I will do the best I can
27 within a very few words.

28 A case such as we are now considering involves three

1 divisions of the commission, at least, or four, I should
2 say.

3 It will involve the Examiner's division through a
4 hearing officer. It will involve the Legal Division through
5 an attorney assigned to the proceeding. It will involve the
6 Transportation Division who goes into the engineering
7 aspects of it and, generally speaking, will review
8 allocations, depreciation, things like that. It could
9 involve the Finance & Accounts Division in looking over
10 recorded results of the books, supplying the Transportation
11 Division with detail determined by an analysis of accounting
12 records. It will involve four divisions. It should be
13 a coordinated effort.

14 ASSEMBLYMAN BERMAN: In the course of doing all this
15 is it the rule or the practice that the PUC staff has or
16 is entitled to access to all of the data that the company
17 seeking the rate increase might have in its possession to
18 make the independent evaluation you would need to?

19 MR. DONOVAN: Generally speaking, we have no trouble
20 in that respect at all. It's a rare occasion when we do.

21 ASSEMBLYMAN BERMAN: Going to the raw data?

22 MR. DONOVAN: That's correct.

23 ASSEMBLYMAN BERMAN: Is that already a determined
24 matter of law, that you have that right, or is this a --

25 MR. DONOVAN: It's a matter of law that we have the
26 right, to my understanding. I'm not an attorney, but I
27 believe that is a correct statement.

28 The attorney to my left can answer that probably better

1 than I.

2 CHAIRMAN PAPAN: I'd like to put the gentleman under
3 oath. And may we indicate your name, sir, after that?

4 MR. FOLEY: Yes. My name is William N. Foley,
5 principal counsel, Legal Division, Public Utilities
6 Commission.

7 - - -

8 WILLIAM N. FOLEY,
9 having been first duly sworn, testified as follows:

10 MR. FOLEY: In response to your question --

11 CHAIRMAN PAPAN: Your name, first, sir?

12 That would surely help us.

13 MR. FOLEY: My name is William N. Foley, principal
14 counsel in the Legal Division of the Public Utilities
15 Commission.

16 In response to your question, Mr. Berman, the
17 commission does have authority to request data and information
18 of any type from any company under its jurisdiction, any
19 public utility.

20 ASSEMBLYMAN BERMAN: Would that include analyses of
21 company data prepared by others and submitted to the
22 company?

23 MR. FOLEY: Well, the specific provision that I have
24 in mind is Public Utilities Code Section 581 which directs
25 that public utilities shall furnish answers to questions or
26 information requested by the commission.

27 So, now, whether -- as to whether a particular report
28 might be within the attorney-client privilege, that I'm

1 just not sure about. It's possible that a company could
2 raise that, but I don't have any recollection of that
3 occurring.

4 ASSEMBLYMAN BERMAN: How about raising the work
5 product privilege as a basis for refusing to provide data
6 that the company has in its possession?

7 MR. FOLEY: Well, again, I think the commission is
8 probably bound by the so-called work product privilege.
9 I think the question is, what is included.

10 ASSEMBLYMAN BERMAN: Right.

11 MR. FOLEY: Draft notes of a public utility attorney on
12 his brief, something like that, certainly, I imagine that is
13 in. Whether a study of the type that is being discussed
14 here today would be in, I personally have some doubts, but
15 I haven't researched it.

16 It's difficult for me to express a firm opinion.

17 ASSEMBLYMAN BERMAN: What is the legal relevance of
18 the question of can something be justified by an analysis of
19 the rate, the proposed rate increase effect on gross
20 revenues versus net revenues, is there some standard in the
21 law which is geared to those two tests in terms of, say,
22 a particular increase that Southern Pacific is seeking here?

23 MR. FOLEY: No, sir. Speaking to SP, it's within
24 their prerogatives to prepare their application on whatever
25 basis they want to prepare it and present it to the
26 commission. The applicant has the burden of proof to prove
27 at a public hearing that its request is justified and the
28 proposed rates are just and reasonable. And the commission --

1 ASSEMBLYMAN BERMAN: Whether they make that argument
2 based on the effect on gross revenues or make that argument
3 based on its effect on net revenues, that is a question of
4 tactics for them to decide?

5 MR. FOLEY: Yes, that's correct. And the commission
6 staff or any other parties that are intervened in the proceed-
7 ing may have some other theory, and, ultimately, the commiss-
8 ion will decide whose theory should be adopted.

9 ASSEMBLYMAN BERMAN: There is no theory of such pre-
10 scribed in the statute?

11 MR. FOLEY: No, sir.

12 MR. DONOVAN: If I may, Mr. Papan, before I continue,
13 by word of explanation, I have been with the commission
14 37 years. I have been director or assistant director for
15 25. I have been director for 11. I am a Certified Public
16 Accountant and have been for 37 years.

17 CHAIRMAN PAPAN: Thank you, Mr. Donovan.

18 Mr. Tomita, I think I'd like to put you under oath
19 now. And I have some questions for you as well.

20 - - -

21 KENJI TOMITA,
22 having been first duly sworn, testified as follows:

23 CHAIRMAN PAPAN: Mr. Tomita, I understand you are
24 more directly familiar with the fare request?

25 MR. TOMITA: Yes.

26 CHAIRMAN PAPAN: I understand that you told my assistant
27 Mr. Don Fields, that Finance & Accounts would not be part-
28 icipating in the SP rate case, that you were awaiting the

1 final results from the study currently being undertaken by
2 the Auditor General?

3 MR. TOMITA: No, that is not correct.

4 CHAIRMAN PAPAN: Is that still your understanding of the
5 status of that?

6 MR. TOMITA: No, no, that is not correct.

7 CHAIRMAN PAPAN: Could you fill us in on that?

8 MR. TOMITA: I indicated to Mr. Fields that we have
9 not arrived at a determination as to what our participation
10 would be, because there was this question, since you had
11 ordered the Auditor General's office to audit the books of
12 SP, and we were concerned with the possible duplication
13 that may exist, and Mr. Fields told me that he did not --
14 or that you did not want the commission not to do any
15 audit work because of what you may request the Auditor
16 General to do, and, therefore, that was my explanation to
17 him.

18 CHAIRMAN PAPAN: Mr. Donovan, let me ask you a
19 question.

20 Did you appear before Assemblyman Foran's committee
21 the last two days? I think they were conducting hearings
22 on staff and extending the staff of the PUC.

23 MR. DONOVAN: Assemblyman Foran?

24 CHAIRMAN PAPAN: Yes.

25 MR. DONOVAN: Yes, I did.

26 CHAIRMAN PAPAN: Thank you.

27 Are there any other questions?

28 [No response.]

1 CHAIRMAN PAPAN: Is Mr. Gielegthem here?

2 MR. GIELEGHEM: Yes, I am.

3 CHAIRMAN PAPAN: We'd like to ask you a few questions.
4 Thank you, gentlemen.

5 Mr. Gielegthem, if I might swear you in.

6 MR. GIELEGHEM: Yes, I would appreciate that. Thank
7 you.

8 - - -

9 A. L. GIELEGHEM,
10 having been first duly sworn, testified as follows:

11 CHAIRMAN PAPAN: Mr. Gielegthem, I understand that you
12 are the principal utilities financial examiner for the
13 commission. Can you tell me what your understanding is of
14 the participation of Finance & Accounts in the present
15 Southern Pacific fare application case?

16 MR. GIELEGHEM: I first became aware of that about --
17 at about, oh, 9:50 this morning when a document --

18 CHAIRMAN PAPAN: Speak a little louder, would you,
19 Mr. Gielegthem?

20 MR. GIELEGHEM: Yes, sir.

21 CHAIRMAN PAPAN: Thank you.

22 MR. GIELEGHEM: I first became aware of that about
23 9:50 this morning when the document appeared on my desk.
24 And I think all through this matter I would prefer, if I
25 can, to supply you with documents, because my interpretation
26 of these documents may be incorrect.

27 CHAIRMAN PAPAN: Fine.

28 MR. GIELEGHEM: And I have copies of many documents.

1 CHAIRMAN PAPAN: Will the Sergeant at Arms . . .

2 And we will indicate that those documents will be made
3 a part of the record.

4 Are you prepared to give us those documents now, sir,
5 or are you waiting until you present testimony and, then,
6 you're going to provide us with the documents?

7 MR. GIELEGHEM: I would prefer to use the document, and
8 then, amplify upon the documents.

9 CHAIRMAN PAPAN: Thank you.

10 A little louder, because the audience gets restless.
11 I know it's difficult because the speaker -- there isn't
12 a speaker.

13 MR. GIELEGHEM: I am a bit nervous as well, because
14 I was told --

15 CHAIRMAN PAPAN: Make yourself at ease. I'm sure if
16 we can get the benefit of your testimony that is of vital
17 importance to us, so go right ahead, sir.

18 MR. GIELEGHEM: I am nervous for another reason. I
19 was told by a member of the staff this morning who has some
20 status around this commission to watch my rear end. And I'm
21 a little cautious on that ground.

22 I have been with the commission about 26 or 27 years.
23 About ten years ago I came to San Francisco as the assistant
24 director and worked with Mr. Donovan for two years until I
25 became ill. Therefore, it's been a long and difficult period
26 of reprisal and harrasment and descrimination, and within
27 that framework I am sitting here today nervous, if you can
28 appreciate that.

1 CHAIRMAN PAPAN: Well, Mr. Bennett made statements
2 similar to that, and I imagine somewhere along the line
3 there will probably be a joint committee to examine fully
4 the staffing of the Public Utilities Commission.

5 So if you can present us with your testimony in the
6 best fashion you can, we are here to listen to it and we
7 appreciate any brevity and conciseness so that we can move
8 along, sir.

9 MR. GIELEGHEM: I will do that, sir.

10 ASSEMBLYMAN BERMAN: I will indicate, of course, that
11 what you say here would be immune from any efforts of re-
12 prisal for whatever might logically occur, as if there were
13 no people looking.

14 CHAIRMAN PAPAN: He is giving you that assurance.

15 MR. GIELEGHEM: The document I referred to is an Advice
16 of Participation by Finance and Account Division.

17 CHAIRMAN PAPAN: A little louder, sir, because we have
18 got an audience that really --

19 MR. GIELEGHEM: The documents I am speaking of is called
20 an Advice of Participation of Planning by Finance and Accounts
21 Division. It is a form used in my division to initiate
22 action on any particular matter before the commission.

23 The one concerning Southern Pacific Transportation
24 Company's fare increase appliation No. 55131 is dated
25 October 25, 1974. It appeared on my desk at about 9:50
26 a.m. this morning, October 31st, 1974. It includes additional
27 information as to the assignment of the matter to Mr. Vukasin
28 and Examiner Gagnon. And it contains some language as to

1 the extent of my division's participation. And I will de-
2 scribe that in my own language as being boiler plate. It
3 does not tell, really, what we're going to do. The same
4 language appears on hundreds of advices of participation.

5 My name is cited as a reference point or as a contact.
6 And it is signed by Mr. Donovan, the director of the division.

7 CHAIRMAN PAPAN: Am I to infer, because of the late-
8 date of this, since this was on application in August and,
9 then, there was a hearing on the 9th, that this is the first
10 indication that you have had that you were going to be assigned
11 or this has been assigned to this particular division, is
12 that it?

13 MR. GIELEGHEM: Yes, sir. And, in addition, it also
14 removed some thoughts that I received by indirection that
15 somebody else was going to do the job. I understand
16 Mr. Tomita indicated that the auditor general's office was
17 going to do the audit.

18 CHAIRMAN PAPAN: And that you would be precluded from
19 any of this activity, is that it?

20 MR. GIELEGHEM: That was my understanding, right.

21 Now, before this time, and in my connection with the
22 division in the Transportation and General branch, I watched
23 the calendar for matters that should require our attention,
24 because I am concerned not only with working on things that
25 are interesting and important but using my people in the
26 right manner. I failed to note on the commission's calen-
27 dar the filing of the application by Southern Pacific on
28 the 23rd of August 1974. I also did not receive the appli-

1 cation.

2 Now, normally a copy of such an application would
3 immediately be channelled to me through Mr. Donovan and
4 Mr. Tomita, and by that means I would, additionally, be
5 noticed as to what was going on.

6 I did, however, become aware of the Southern Pacific
7 matter in two ways, the newspaper, of course, and by memo-
8 randum sent to me by Mr. Milton J. DeBarr, who is a financial
9 examiner, grade 4, who has worked with me and for me for
10 many years. He, in effect, asked, "What is there to work
11 on? We are out of work. What about the Southern Pacific's
12 110 percent increase?" He was 1 percent off, but I knew
13 what he was talking about.

14 That document I have with me, and I annotated that
15 document in my own handwriting in pencil answering the
16 several inquiries that he posed, by annotations at the
17 bottom, with respect to Southern Pacific Company.

18 I said, "We have not been authorized to do this. I
19 have been told by Mr. Tomita that in matters of this kind
20 the role of our staff is not important, that these matters
21 are usually dominated by either the ICC or by others in
22 the commission."

23 So I don't misconstrue that document, I would like
24 to furnish a copy of that for the record.

25 Mr. Chairman --

26 CHAIRMAN PAPAN: Yes. Go right ahead, sir.

27 MR. GIELEGHEM: I did, incidentally, attempt to find
28 out what I'm supposed to do here with reference to documents

1 and records within my possession by reading General Order
2 No. 66C of the commission and the Manual of Instructions to
3 Employees. And I'm not quite sure whether I am allowed to
4 bring these documents here or not.

5 CHAIRMAN PAPAN: Mr. Foley, why don't you come back
6 and kind of --

7 MR. FOLEY: I am here.

8 CHAIRMAN PAPAN: Is there any reservation about those
9 documents, and, if so, will you tell me what reservations
10 there are?

11 MR. FOLEY: Well, I think what Mr. Gielegghem is raising
12 is the commission has a general order, which is regulation
13 66C, which, in effect, classifies the different types of
14 information that the commission has on file as to which
15 can be made public and which cannot. And basic rule is,
16 anything in the official public files in the commission's
17 file room is open to public inspection. All other material
18 the commission must be first requested and, then, it can
19 order that that type of material -- you can call it con-
20 fidential material, if you wish -- will be made available
21 to the requestor, and this type of --

22 CHAIRMAN PAPAN: Do you have any reluctance to us
23 having that?

24 MR. FOLEY: Well, I was just going to say, I have dis-
25 cussed this situation with the general counsel and in light
26 of your subpoena which seems to indicate that you want all
27 memoranda in Mr. Gielegghem's possession respecting this
28 particular application, we are not going to press the appli-

1 cability of General Order 66C.

2 ASSEMBLYMAN BERMAN: Could we ask a few questions to
3 find out what the policy is behind having this public file
4 where everything is open and having a different kind of file
5 which only, upon particular actions of the commission and
6 requests, can the matters be made public?

7 What is the intent of that distinction?

8 MR. FOLEY: Well, it's based on law, Mr. Berman. There
9 is a code section in the Public Utilities Code which
10 states that -- and let me give you the specific reference.
11 It's Public Utilities Code Section 583. And this respects
12 information that the commission receives from public
13 utilities. And it states, simply, that "no information
14 furnished to the commission by public utility except such
15 matters as are specifically required to be opened to public
16 inspection by the provisions of this part shall be opened
17 to public inspection or made public except on order of the
18 commission or by the commissioner or commissioners in the
19 course of hearing or proceeding. Any officer or employee
20 of the commission who divulges any such information is guilty
21 of a misdemeanor."

22 Now, with respect to memoranda within the commission,
23 commission staff memoranda and that kind of --

24 ASSEMBLYMAN BERMAN: That is your work product.

25 [Laughter]

26 MR. FOLEY: Well, as I say, the commission in the
27 General Order 66C has classified that material as confiden-
28 tial. There is a procedure by which it may be made public.

1 That procedure is to write a letter to the secretary of the
2 commission who is the custodian of all the records and ask
3 him to present the request to the commission. And the re-
4 quest is reviewed and the commission either grants or denies
5 the request. That is all that is involved, is a procedure.

6 Part of the purpose the rule is that the commission, in
7 the course of it's economic regulatory activities, receives
8 a lot of economic data and information which might or might
9 not be harmful to the companies if it were publicized, but
10 what I want to emphasize is that any exhibit introduced in
11 a proceeding before the commission which is given an
12 exhibit number and is officially entered into the record in
13 a particular case or application is public information and
14 is available in the file room to anybody at any time, but
15 the other material, the procedure is that the requestor must
16 first write the commission and get the commission's per-
17 mission to see these various other types of information.

18 And I think what Mr. Gielegem is raising is that he
19 fears, perhaps, that he might be violating General Order 66C
20 if he turns over here today memoranda or anything else in
21 his possession. But, as I say, I have discussed this with
22 the general counsel, and our view is that there is a subpoena
23 to Mr. Gielegem to present all the material or memoranda
24 he may have in his possession, so we are willing to operate
25 under the subpoena, and he can, as far as we're concerned,
26 present the material.

27 As I understand it, that would be what you would want
28 and how you would rule, so we are attempting to cooperate as

1 fully with your hearing and the calling of these witnesses.

2 ASSEMBLYMAN BERMAN: Let me ask, Mr. Gieleghem, is
3 there anything in these materials that you would be reluc-
4 tant to present to us on the ground that it would be hamper-
5 ing the independent work of the staff in making judgments
6 regarding this particular case?

7 MR. GIELEGHEM: To the contrary. I think it would
8 advance the work of the staff in an open atmosphere.

9 The document I referred to earlier --

10 CHAIRMAN PAPAN: Just a minute, Mr. Gieleghem.

11 MR. GIELEGHEM: I'm sorry.

12 ASSEMBLYMAN BERMAN: Could I suggest we just review for
13 a second the documents you have turned over to us and made
14 reference to so we can see where we are?

15 The initial document was an Advice of Participation plan-
16 ned by Finance and Accounts Division, is that right? You
17 already gave that to us?

18 MR. GIELEGHEM: That is the one that was dated October
19 25th.

20 ASSEMBLYMAN BERMAN: Dated October 25, 1974. Indicates
21 the commissioner to whom this case was assigned, the examiner,
22 and specifying yourself as the contact person?

23 MR. GIELEGHEM: That's right, sir.

24 ASSEMBLYMAN BERMAN: Then, the next document you made
25 reference to, I believe was, a letter saying, "We have
26 nothing to do"?

27 MR. GIELEGHEM: It's a memorandum from Mr. Milton J.
28 DeBarr. He is a financial examiner for -- he works for me

1 and with me. That memorandum is dated September 3, 1974.
2 And it speaks for itself.

3 CHAIRMAN PAPAN: Let me see that, sir. [Examining].

4 Okay. We will incorporate that also.

5 ASSEMBLYMAN BERMAN: Why don't you specify now in greater
6 detail what these next two documents are that you were refer-
7 ring to? You talked about the --

8 MR. GIELEGHEM: Mr. DeBarr's memo first or --

9 ASSEMBLYMAN BERMAN: Well, you have just given us the
10 DeBarr memo.

11 MR. GIELEGHEM: Right. I'd like to add to comments
12 to that, if I may.

13 You notice reference twice to Pacific Southwest Airlines,
14 PSA. This is a part of the problem we're talking about here
15 today. It's not just Southern Pacific in this application,
16 but Southern Pacific in this application and the prior
17 application and matters like PSA, United Parcel Service and
18 other matters of that kind. It's a continuous thread and
19 a constant pattern.

20 This is what we're talking about now.

21 ASSEMBLYMAN BERMAN: Redefine what is that pattern defined
22 disturbing.

23 MR. GIELEGHEM: The inability of the staff to remain
24 independent in hearings before the commission. And this
25 is, in large measure, caused by manipulation of the staff
26 by many devices.

27 ASSEMBLYMAN BERMAN: With respect to who is assigned
28 to work on it and how many staff are permitted to work on it

1 when matters are, in fact, assigned to the staff, those
2 kind of techniques or --

3 MR. GIELEGHEM: These are some elements. The best
4 and most recent illustration is the PSA matter, which was,
5 by extraordinary resolution assigned only to Mr. DeBarr and
6 his designates including the whole Finance and Accounts Divi-
7 sion, from that proceeding. I have never seen anything like
8 that before in my life.

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1 There is considerably more in a way of memoranda and
2 documentation of that transaction.

3 And the other cases I mentioned are also thought with
4 many of the same difficulties.

5 ASSEMBLYMAN BERMAN: You say there are some significant
6 and substantial number of memoranda regarding the manner,
7 extraordinary manner in which the PSA rate increase appli-
8 cation was handled?

9 MR. GIELEGHEM: Yes, sir. These are memoranda generated
10 by me and in many instances supported by others, including
11 Mr. Donovan and Mr. DeBarr.

12 ASSEMBLYMAN BERMAN: At this time those memoranda have
13 not been presented to any legislative committee, as far as
14 you know?

15 MR. GIELEGHEM: That is true, sir.

16 ASSEMBLYMAN BERMAN: I don't know if that is the juris-
17 diction of this particular subcommittee, but it might be
18 something to think about in the future.

19 MR. GIELEGHEM: The basic document, of course, in the
20 Southern Pacific matter is the application, and I have a
21 copy of it before me. The date it was filed was April 23,
22 1974.

23 It was received by Mr. Donovan on August the 26th, 1974.
24 His initials and that date appear.

25 Following that are the initials K.T., I believe Mr. Kanji
26 Tomita.

27 I did not see this application until the week of October
28 the 21st, although I inquired about it around the commission

1 in our division and was finally given a copy. I would like
2 to --

3 ASSEMBLYMAN BERNAN: What reasons were you given as to
4 why you were not given a copy of that prior to that time?

5 MR. GIELEGHEM: I asked Mrs. Pauline (unintelligible
6 last name), Mr. Donovan's secretary, where it was, because
7 I became aware of the matter through the newspapers, Mr. DeBarr
8 and the pre-hearing conference. That is all I know.

9 The fact that shortly after I specifically asked her
10 for it, I got this copy.

11 ASSEMBLYMAN BERNAN: In the normal course of your work
12 in your position on the commission, would you receive a copy
13 of an application like that in a much shorter period of time
14 after that application was filed?

15 MR. GIELEGHEM: I would say two or three days after filing,
16 yes, and most certainly the matter of the SP increase of
17 111 percent.

18 ASSEMBLYMAN BERNAN: Just normally as a practice, what
19 would be the maximum you would take after receiving that appli-
20 cation?

21 MR. GIELEGHEM: The applications that I received come
22 from Mr. Tomita and normally include his initials and date
23 with some rather cryptic notations like "NP" for "No partici-
24 pation" or an inquiry like "comments".

25 Upon my review of these matters, if he indicates that
26 it is not a matter that we are not going to participate in,
27 I would talk to him or write him a memorandum suggesting
28 the approaches and some of the problems and the issues.

1 Sometimes I even write the advice of participation my-
2 self, but normally he does this, and usually in terms of
3 the boiler plate that I described earlier, with no real
4 indication of what he wants done by way of policy or any
5 other direction in that sense.

6 CHAIRMAN PAPAN: Mr. Fields would like to ask you a
7 question in order that we might move it along so we can see
8 ourselves through here by 4:00.

9 MR. FIELDS: Mr. Gieleghem, do you have any knowledge of
10 reports within your division that have been prepared by staff
11 members which -- on SP rate increases -- which have not been
12 used in the presentation before the commission, and can you
13 comment on possibly some of the reasons why the reports have
14 not been used?

15 MR. GIELEGHEM: First, I have knowledge -- and it is,
16 again, in conjunction with Southern Pacific Company -- and
17 the rate increase of about two years ago.

18 The people involved were myself and a gentleman by the
19 name of Lloyd Humphry, who at this time worked for me and
20 now works for the utilities branch of our division.

21 The report was prepared, was submitted and was suppressed.

22 I have memoranda here that describes the entire story.

23 MR. FIELDS: Can you give us some idea of why it was
24 suppressed? I mean was it the quality of the work, was that
25 questioned? Was that the question on the --

26 MR. GIELEGHEM: No, I don't think so. I think it was
27 a matter of the issues that we attempted to present and the
28 exceptions we took with respect to income tax and the problems

1 that we were concerned about in terms of other elements of
2 the rate-making process that had not been agreed upon or in
3 fact coordinated with the transportation division..

4 MR. FIELDS: As you may know, in our hearings in Burling-
5 ame on the 19th and 20th, the question of income taxes, the
6 writing off of certain expenses on income taxes was a matter
7 of concern in an attempt to get at the actual operating costs
8 of a commute service.

9 Can you give us a specific instance on were you prepared
10 to report, and you don't feel that it wasn't used in the
11 presentation?

12 MR. GIELEGHEM: Yes, that case, of course, is one I
13 am talking about. 52613 is the application number.

14 And that report the records will show that the Finance
15 and Accounts Division did not present a report.

16 We had a witness; there is a transcript; and the formal
17 file provides the full story of what happened.

18 The big problem in that case was refusal of Southern
19 Pacific Company to allow staff access to the income tax
20 returns.

21 And since we were dealing with an income tax calculation,
22 that is where we started.

23 Mr. Humphry was finally forced to go to the consolidated
24 overall financial data of Southern Pacific Company to recon-
25 struct as best he could a composite tax rate which we could
26 use here in California. And that is what happened.

27 He was after, of course, if I may explain one more facet,
28 he was after how much losses from commute would in fact be

1 recovered through utilizing those losses against other
2 profits to reduce income taxes. This is what we were trying
3 to get.

4 If I remember the numbers correctly, the loss that was
5 initially claimed was in the neighborhood of 1.8 million
6 dollars. There were adjustments and other estimates by the
7 commission which brought that down to about one third.

8 CHAIRMAN PAPAN: In order that we expedite this a bit,
9 on the two documents that you expressed a concern about, we
10 are not going to make those a part of the public record.

11 The fact that you have indicated and counsel has so
12 indicated that this has to be procured through the commission,
13 I will respect that, and we have knowledge now that there
14 is this kind of procedure.

15 As chairman of this committee, it is my intention to
16 submit in writing a request from the Speaker to see if we
17 can formulate a joint committee to examine the area affecting
18 the staffing and activities of the Public Utilities Commission
19 with its staff.

20 That is where we are, Mr. Foley, that is where I am,
21 and initially, when we formed the subcommittee, it was with
22 regard to the corridor and the commuter service that is pre-
23 sently furnished.

24 In view of what has developed, I think it is another
25 area that the legislature should devise possibly a joint
26 committee to look into these matters.

27 If there is additional material, please let us have
28 it together, without violating existing regulations affecting

1 the Public Utilities Commission.

2 MR. GIELEGHEM: Mr. Papan, I am not a lawyer. Is there
3 someone in the commission who could go over these papers
4 with me and decide which ones I can legally give to you and
5 which ones I cannot?

6 CHAIRMAN PAPAN: Mr. Foley, would you do that?

7 MR. FOLEY: Yes, Mr. Papan, I am willing to do it. But
8 if you want to write a letter to the secretary of the
9 commission asking for --

10 CHAIRMAN PAPAN: We will do that, and we will --

11 MR. FOLEY: And the commission will take it under con-
12 sideration, and my guess is that we will cooperate with you.

13 CHAIRMAN PAPAN: We will do that, Mr. Foley, and we
14 will also send you a copy of the letter requesting that the
15 speaker formulate this joint committee to go into this
16 area in some depths.

17 Mr. Berman, any other questions?

18 ASSEMBLYMAN BERMAN: No.

19 CHAIRMAN PAPAN: Then, I will call this meeting adjourned.
20 Thank you.

21 [The meeting was adjourned at 3:53 p.m.]

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